CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 144.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, AND ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE PAUAHI BISHOP, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED DECEMBER 27, 1904.

(19,573.)

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SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1905.

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a In the Supreme Court of the United States, October Term, 1904.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment or decree which is in the said supreme court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the said suit between Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, plaintiffs, and The Territory of Hawaii, defendant, where was drawn in
b question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or where was drawn in question the validity of a statute of, or an authority exercised under, said Territory, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised, under the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, a manifest error hath happened to the great damage of the said Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within

thirty days from the date hereof, in the said Supreme Court, to be then and there heard, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be
c done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 29th day of November, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by—
W. F. FREAR,
Chief Justice of the Supreme Court
of the Territory of Hawaii.

d [Endorsed:] Supreme Court of the United States. Joseph O. Carter *et al.*, trustees, plaintiff-, *vs.* Territory of Hawaii, defendant. Writ of error. Filed November 29, 1904. Henry Smith, clerk. Ballou & Marx, 303 Stangenwald bldg., Honolulu, attorneys for —. (Office No. —.)

e In the Supreme Court of the Territory of Hawaii.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in Error.

Assignment of Errors.

Now come Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, plaintiffs in error in the above entitled cause, and respectfully submit:

That in the record, proceedings, decision and final judgment of the supreme court of the Territory of Hawaii in the cause entitled "Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, plaintiffs *vs.* The Territory of Hawaii, defendant," on which final judgment of said supreme court of the Territory of Hawaii was rendered on the 1st day of December, A D., 1902, the said Joseph O. Carter, William F. Allen, William O.

Smith, Samuel M. Damon and Alfred W. Carter, trustees
f under the will of Bernice Pauahi Bishop, deceased, having obtained a writ of error upon said judgment of said supreme court of the Territory of Hawaii returnable within thirty days after the date of said writ of error to the Supreme Court of the United States at Washington in the District of Columbia, assign for error in the record and judgment aforesaid the following, to-wit:

First. That the said supreme court of the Territory of Hawaii erred in deciding upon a bill of exceptions duly taken and allowed to certain rulings of the circuit court for the first judicial circuit of the Territory of Hawaii in and upon the trial of said cause, said cause being brought under and by virtue of sections 95 and 96 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii" approved the 30th day of April, A. D. 1900, that a verdict was properly ordered for the defendant by said circuit court in said cause;

Second. That said supreme court of the Territory of Hawaii erred in deciding that the Hawaiian statutes giving konohikis or landlords special privileges in the sea fisheries adjoining their land were not grants of property or covenants in the nature of grants but were public statutes in which no one could acquire a vested right;

Third. That said supreme court of the Territory of Hawaii erred in deciding that upon the repeal of all laws of the Republic of Hawaii which conferred exclusive fishing rights upon any person or persons, subject, however, to vested rights, which repeal is con-
tained in section 95 of said "Act to provide a government for
g the Territory of Hawaii," approved April 30th, 1900, the konohikis or landlords no longer had any private property in their fisheries;

Fourth. That said supreme court of the Territory of Hawaii erred in deciding that exclusive rights in the sea fisheries surrounding the islands comprising the Territory of Hawaii could not be acquired by prescription or ancient custom;

Fifth. That said supreme court of the Territory of Hawaii erred in over-ruling the fifth exception of plaintiffs' said bill of exceptions, said fifth exception being as follows, to-wit:

"5. The plaitiffs claim to have acquired a vested right in said sea fishery by virtue of the laws of the Kingdom of Hawaii respecting sea fisheries and by virtue of the common law of Hawaii and of ancient custom in Hawaii. In support of this claim plaintiffs offered to prove that for a period of sixty years plaintiffs, and those under whom they claim title, have been in possession of the sea fishery of Waialae-iki, described in plaintiffs' complaint, claiming title to the same; that said possession so far as the konohiki right is concerned, had been continuous, exclusive and notorious for said period, and under a claim of right; that the rights claimed to said fishery consisted of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds according to the metes and bounds set our in said complaint, one given species or variety

of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart, and also the right in lieu of setting apart some particular fish for their exclusive use, to prohibit upon consultation with the tenants of their lands all fishing within the fishing grounds within the metes and bounds above set forth during certain months of the year and during the fishing season to exact from each fisherman one-third of all the fish taken from said fishing grounds.

The court excluded said testimony as incompetent, irrelevant and immaterial, to which ruling the plaintiffs duly excepted and their exception was allowed."

Sixth. That said supreme court of the Territory of Hawaii erred in over-ruling the sixth exception of plaintiffs' said bill of exceptions, said sixth exception being as follows, to-wit:

h "6. Plaintiffs thereupon offered to prove that from time immemorial that by Hawaiian custom and that by the common law of Hawaii, prior to the passage of the act of June 7, 1839, relating to fisheries, a similar right to the sea fishery of Waialae-iki had been held and enjoyed under those under whom plaintiffs claim title as appurtenant to said land of Waialae-iki.

This offer to prove was rejected as incompetent, irrelevant and immaterial, to which ruling plaintiffs duly excepted and their exception was allowed."

Seventh. That said supreme court of the Territory of Hawaii erred in over-ruling the seventh exception of plaintiffs' said bill of exceptions, said seventh exception being as follows, to-wit:

"7. The plaintiffs thereupon offered to prove that prior to the enactment of June 7, 1839, relating to fisheries, that rights similar to those set out in said statute from time immemorial had been enjoyed by those under whom plaintiffs claim the title to the land of Waialae-iki, as appurtenant to said land; and that said rights had been openly, continuously and notoriously asserted and exercised under claim of title, to the exclusion of all other persons.

The presiding judge ruled this evidence to be incompetent, irrelevant and immaterial, to which ruling the plaintiffs duly excepted, and their exception was allowed."

Eighth. That said supreme court of the Territory of Hawaii erred in over-ruling the eighth exception of plaintiffs' said bill of exceptions, said eighth exception being as follows, to wit:

"8. The presiding judge thereupon ruled that no vested rights could be acquired in sea fisheries in Hawaii as against the Territory of Hawaii by virtue of any occupation or custom of the country or of any statute of Hawaii respecting fisheries to which ruling the plaintiffs duly excepted and their exception was allowed."

Ninth. That said supreme court of the Territory of Hawaii erred in over-ruling the ninth exception of plaintiffs' said bill of exceptions, said ninth exception being as follows, to-wit:

i "9. Thereupon the presiding judge ruled that upon the repeal of the laws of Hawaii respecting fisheries, by the or-

ganic act the plaintiffs' rights in said sea fishery became terminated. To this ruling plaintiffs duly excepted and their exception was allowed."

Tenth. That said supreme court of the Territory of Hawaii erred in over-ruling the tenth exception of plaintiffs' said bill of exceptions, said tenth exception being as follows, to-wit:

"10. The presiding judge thereupon ordered judgment entered for the defendant, the parties having waived trial by jury, to which order and ruling and judgment the plaintiffs duly excepted and their exception was allowed."

Wherefore and on account of said manifest errors and each of them, all of which errors appear upon the record of said cause and in the decision and judgment of said supreme court of said Territory of Hawaii, said Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, pray that the judgment of the said supreme court of the Territory of Hawaii in said cause may be reversed, and that the said supreme court of the Territory of Hawaii be ordered to enter an order sustaining plaintiffs' exceptions and each of them and remanding said cause to the circuit court of the first circuit for further proceedings.

Honolulu, November 28, 1904.

SIDNEY M. BALLOU,
BENJAMIN L. MARX,
Attorneys for Plaintiffs in Error.

j [Endorsed:] Supreme court, Territory of Hawaii. Joseph O. Carter *et al.* trustees plaintiff- *vs.* Territory of Hawaii defendant Assignment of errors. Filed November 29 1904 Henry Smith clerk. Ballou & Marx 303 Stangenwald bldg. Honolulu attorneys for — (Office No. —.)

k In the Supreme Court of the United States.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in Error.

Citation to Defendant in Error.

The United States of America to the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Terri-

tory of Hawaii, wherein Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, are plaintiffs in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

l Witness the Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii this 29th day of November, A. D. 1904.

W. F. FREAR,
Chief Justice Supreme Court, Territory of Hawaii.

Received a copy of the within citation this 29th day of November, 1904.

LORRIN ANDREWS,
Attorney General, Counsel for Territory of Hawaii.

m [Endorsed:] Supreme Court of the United States. Joseph O. Carter *et al.*, trustees, plaintiff-, *vs.* Territory of Hawaii, defendant Citation to defendants in error Filed November 29 1904 Henry Smith, clerk. Ballou & Marx, 303 Stangenwald bldg. Honolulu attorneys for —. (Office No. —.)

n In the Supreme Court of the Territory of Hawaii.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs,

vs.

THE TERRITORY OF HAWAII, Defendant.

Clerk's Certificate.

TERRITORY OF HAWAII, Honolulu, Oahu, } *ss.*:

I, Henry Smith, clerk of the supreme court of the Territory of Hawaii and custodian of the records and archives of said supreme court, do hereby certify that the pages numbered from 1 to 5 inclusive and attached hereto, contains a true full and correct copies of the originals which are now on file in the clerk's office of said supreme court in the above entitled cause.

In testimony whereof I have caused the seal of said supreme court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this ninth day of December, A. D. 1904.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk Supreme Court, Territory of Hawaii.

o In the Supreme Court of the Territory of Hawaii.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States.

Now come Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, plaintiffs herein and say:

That on the 1st day of December, 1902 the supreme court of the Territory of Hawaii entered a judgment in the above entitled cause in favor of the defendant and against these plaintiffs, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of erorrs which is filed with this petition;

Wherefore these plaintiffs pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for
p the correction of errors so complained of and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) BALLOU & MARX,
Attorneys for Plaintiffs.

Honolulu, November 28, 1904.

q In the Supreme Court of the Territory of Hawaii.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in Error.

Order Allowing Writ of Error from the Supreme Court of the United States to the Territory of Hawaii.

The above entitled matter coming before me upon the petition of the plaintiffs therein for a writ of error from the Supreme Court of the United States to the supreme court of the Territory of Hawaii,

and upon examination of said petition and the record in said matter, and desiring to give the plaintiffs an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be and the same is hereby allowed from the Supreme Court of the United States to the supreme court of the Territory of Hawaii in the above entitled cause, and that the bond presented by said plaintiffs be and the same is hereby approved.

Honolulu, T. H., November 29, 1904.

(Signed) W. F. FREAR,
Chief Justice of the Supreme Court of
the Territory of Hawaii.

(Endorsed and filed November 29, 1904.)

r In the Supreme Court of the United States, October Term, 1904.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs and Plaintiffs in Error,

vs.

THE TERRITORY OF HAWAII, Defendant and Defendant in error.

Bond.

Know all men by these presents that we, Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, a majority of which trustees having the right under said will to act in the name of the whole, principals, and the Pacific Surety Company, a corporation organized and existing under the laws of the State of California, are held and firmly bound unto the Territory of Hawaii in the sum of five hundred dollars ($500.00) to the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and successors in trust, jointly and severally by these present;

The condition of this obligation is such, that

Whereas in a suit pending in the supreme court of the Territory of Hawaii between Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees s & t under the will of Bernice Pauahi Bishop, deceased, plaintiffs and The Territory of Hawaii, defendant, action to establish a fishing right, judgment was rendered against said plaintiffs on the first day of December, 1902, and said plaintiffs having obtained a writ of error and filed a copy thereof in the office of the clerk of said supreme court of the Territory of Hawaii, to reverse the judgment

in said suit, together with a citation directed to said Territory of Hawaii citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia ;

Now therefore if the said Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make their said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In witness whereof said trustees have hereunto set their hands and seals and said Pacific Surety Company has caused its corporate name to be signed and its corporate seal to be affixed by its duly authorized agent, this 28th day of November, A. D. 1904.

(Signed) ALFRED W. CARTER, Trustee,
(Signed) W. O. SMITH, Trustee,
(Signed) J. O. CARTER, Trustee,
(Signed) S. M. DAMON, Trustee,
Trustees under the Will of Bernice Pauahi Bishop.

[Corporate Seal.]

PACIFIC SURETY COMPANY,
By ZENO K. MEYERS,
Attorney in Fact.

(Endorsed and filed November 29, 1904.)

In the Supreme Court of the Territory of Hawaii.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice Pauahi Bishop, Deceased, Plaintiffs,
vs.
THE TERRITORY OF HAWAII, Defendant.

Certificate of Clerk to Transcript.

TERRITORY OF HAWAII, Honolulu, Oahu, } ss :

I, Henry Smith, clerk of the supreme court and *ex-officio* clerk of the circuit court of the first judicial circuit of the Territory of Hawaii and custodian of the records and archives of said supreme court and said circuit court, do hereby certify that the pages numbered from 1 to 48 inclusive and attached hereto, contain a true and complete transcript of the record and proceedings had in the said supreme and circuit courts in the above entitled case as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said supreme court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this second day of November, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court and *Ex-officio* Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

1 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, August Term, 1902.

$2 stamps.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, Plaintiffs,
vs.
THE TERRITORY OF HAWAII, Defendant.
} Action to Establish Fishing Right.

To the Honorable A. S. Humphreys, first judge of the circuit court for the first judicial circuit:

The undersigned, Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon, and Alfred W. Carter all of Honolulu, island of Oahu, Territory of Hawaii, trustees under the will of Bernice P. Bishop, deceased, plaintiffs, complain of the Territory of Hawaii, defendant, and for cause of action show:

1. That the above named plaintiffs are the trustees duly appointed, qualified and acting under and by virtue of the will of Bernice P. Bishop, deceased, which said will has been duly admitted to probate and is on file and of record in the office of the clerk of the supreme court of the Territory of Hawaii.

2. That the plaintiffs claim a vested right as sole and ex-
2 clusive owners in fee simple of all that certain sea fishery situated within the reef, the same not being a pond or artificial enclosure, in Waialae Iki, island of Oahu, bounded and described as follows:

Beginning at a point on the sea shore at a yellow colored stone at the end of the Wailupe fish pond wall, said point being on the boundary of Waialae Iki and Wailupe and running

S. 35° 00′ E. magnetic to the outer line of breakers on the reef in Waialae bay, thence running along said outer line of breakers to a point which is S. 60° E. magnetic from the boundary of Waialae Iki and Waialae Nui; thence

N. 60° 00′ W. to said boundary at the sea shore at high water line at the mouth of the Kapakahi stream, and thence along the shore

line of Waialae Iki at high water line to the initial point, the direct bearing and distance being N. 58° 00′ E. 6500 feet, more or less.

3. That the fishery to which plaintiffs claim to be entitled as aforesaid consists of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds within the metes and bounds above set out, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use, to prohibit, upon consultation with the tenants of their lands, all fishing upon the fishing grounds within the metes and bounds above set forth during certain months of the year; and during the fishing season to exact from each fisherman one third of all the fish taken upon said fishing ground.

4. That from time immemorial the plaintiffs and their grantors by ancient custom and prescription have had an exclusive
3 fishery within the bounds above set out, subject only to the rights of tenants on the land of Waialae Iki, a tract of land situated in the island of Oahu.

5. That said fishery was originally appurtenant to the land of Waialae Iki awarded to A. Paki by Apana 3 of land commission award No. 10613 and confirmed by royal patent No. 3578. That the plaintiffs claim an absolute estate in fee simple in the said fishing rights by purchase under various mesne conveyances, devises and descents from said A. Paki.

6. That said defendant The Territory of Hawaii claims an interest in said fishery adverse to the plaintiffs and is a necessary party to the complete determination of the questions involved in this action.

Wherefore the plaintiffs pray that said defendant The Territory of Hawaii and all other persons claiming an estate or interest in said fishery adversely to the plaintiffs may be summoned to appear and answer this complaint before a jury of the country at the August term 1902, of this court, unless sooner disposed of by judicial authority; and that plaintiffs may have judgment establishing their right to said fishery and for costs.

J. O. CARTER, Trustee.
W. F. ALLEN, Trustee.
S. M. DAMON, Trustee.

(Endorsed and filed May 1, 1902.)

3a TERRITORY OF HAWAII, } ss.:
Island of Oahu, }

Personally appeared S. M. Damon one of the above named plaintiffs, who being duly sworn deposes and says that he has read the foregoing complaint and knows the contents thereof; that the matters therein alleged are true of his own knowledge, except such as are alleged on information and those he believes to be true.

S. M. DAMON, Trustee.

Subscribed and sworn to before me this 25 day of April A. D. 1902.

H. C. CARTER,
Notary Public, First Judicial Circuit.

4 In the Circuit Court of the First Circuit, Territory of Hawaii.

$2. stamps.

JOSEPH O. CARTER ET AL., Trustees under the Will of Bernice P. Bishop, Dec'd,
v.
THE TERRITORY OF HAWAII.
} Term Summons.

The Territory of Hawaii to the high sheriff of the Territory or his deputy, the sheriff of the island of Oahu or his deputy:

You are commanded to summon Territory of Hawaii defendant in case it shall file written answer within twenty days after service hereof, to be and appear before the said circuit court at the August term thereof to be holden at Honolulu island of Oahu on Monday the 4th day of August next, at 10 o'clock a. m., to show cause why the claim of *of* Joseph O. Carter, William F. Allen, William O. Smith, S. M. Damon & Alfred W. Carter, trustees under will — Bernice P. Bishop, dec'd pl'ffs should not be awarded to them pursuant to the tenor of their annexed petition.

And you are commanded to—

And have you then there this writ with full return of your proceedings thereon.

Witness Hon. A. S. Humphreys, first judge of the circuit court of the first circuit, at Honolulu, Oahu, this 1st day of May, 1902.

[SEAL.] A. G. KAULUKOU, Clerk.

Served the within summons as follows:

On the Territory of Hawaii through E. P. Dole, attorney-general of the Territory of Hawaii, at Honolulu, Oahu, the 2nd day of May A. D. 1902,

By delivering to him a certified copy hereof, and of the petition hereto annexed, and at the same time showing him the original as directed.

Dated May 2nd, 1902.

ALBERT McGURN,
Deputy Sheriff.

5 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, August Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, Plaintiffs, *vs.* THE TERRITORY OF HAWAII, Defendant.	Action to Establish Fishing Right.

Answer.

Now comes the Territory of Hawaii, by E. P. Dole, attorney gen-ral, and answering to the plaintiffs' complant herein denies that it has any knowledge or information sufficient to form a belief in regard to any of the allegations contained in paragraphs one two, three, four and five of the plaintiffs' complaint, and, therefor-, denies each and all of the same.

TERRITORY OF HAWAII,
By E. P. DOLE,
Attorney General.

ROBERTSON & WILDER, Of Counsel.

TERRITORY OF HAWAII, Island of Oahu, } ss:

6 E. P. Dole, being duly sworn, deposes and says that he has read the foregoing answer, knows the contents thereof, and that the allegations therein contained are true.

E. P. DOLE.

Subscribed and sworn to before me this 15 day of May, A. D. 1902.

JNO. M. KEA,
[SEAL.] Notary Public, First Judicial Circuit.

(Endorsed and filed May 16, 1902.)

7 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Special July Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, *vs.* THE TERRITORY OF HAWAII.	Action to Establish Fishing Right.

Motion.

Now comes The Territory of Hawaii, by E. P. Dole, attorney general, and moves the court here to advance the above entitled cause

upon the calendar of causes for trial at this present term of this court and that a day be specially set for the trial of said cause.

This motion is based on the record herein and upon the affidavit of A. G. M. Robertson hereto attached and made part hereof.

Dated Honolulu, July 3, 1902.

TERRITORY OF HAWAII,
By E. P. DOLE, Attorney General.

ROBERTSON & WILDER, Of Counsel.

8 To Messrs. Hatch & Silliman, attorneys for plaintiff:

Please take notice that we shall present the foregoing motion to the court on Monday, July 7, 1902, at 10 o'clock a. m. or as soon thereafter as we may be heard.

ROBERTSON & WILDER,
Of Counsel for Defendant.

9 TERRITORY OF HAWAII, } ss:
Island of Oahu, }

A. G. M. Robertson, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the cause entitled Joseph O. Carter *et al. vs.* Territory of Hawaii; that said action is one of many that have been filed under and pursuant to the provisions of section 96 of the organic act of the Territory of Hawaii for the purpose of establishing alleged fishing rights; that seventy eight such actions have been filed and are now pending in the several circuit courts of said Territory; that none of them have yet been tried; that said action may be divided into two principal classes, to wit, claims under patents, and claims under the statutes governing konohiki rights without award or patent; that the above entitled cause belongs to the last mentioned class; that said actions are of much importance to the government and the public; that it is desirable that the opinion of the supreme court should be had at as early a date as possible upon the general questions involved in both classes of cases and to that end it is proposed that one case from each class be selected and tried and carried through to final determination in the supreme court; that deponent believes that the course suggested will save expense to the government as well as litigants and will also save the courts much time.

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 3rd day of July, A. D. 1902.

GEORGE LUCAS,
Clerk First Judicial Circuit.

(Endorsed and filed July 3, 1902.)

10 In the Circuit Court of the First Judicial Circuit, Territory of Hawii, August Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, Plaintiffs, vs. THE TERRITOY OF HAWAII, Defendant.	Action to Establish Fishing Right.

Take notice that the plaintiffs propose to prove the several facts and documents hereunder specified, and that such documents may be inspected by the defendant, its attorneys or agents at the office of Messrs. Hatch & Silliman, attorneys for plaintiffs on Saturday the fifth day of July next between the hours of nine o'clock a. m. and twelve o'clock noon and that the defendant is hereby required within forty-eight hours from the last mentioned hour to admit the said several facts, and that said documents specified to be original were written, signed, or executed as they purport to have been, saving all just exceptions to the admissibility of all such facts and documents as evidence in this cause.

Dated this third day of July, 1902.

HATCH & SILLIMAN,
Attorneys for Plaintiffs.

To Messrs. Robertson & Wilder, attorneys for defendant.

11 Originals.

Description of documents.	Date.
1. Royal patent No. 3578 to A. Paki.....	April 8, 1857.
2. Deed. Charles R. Bishop to Charles R. Bishop *et al.*, trustees under the will of Bernice Pauahi Bishop. Recorded in Hawiian Registry of Deeds in Liber 122 on pages 182–184.....	February 1, 1890.

Facts.

1. That A. Paki died intestate on the 13th day of June, 1855.

2. That the property described in royal patent No. 3578 was inherited by Bernice Pauahi Bishop, as daughter and sole heir of said A. Paki.

3. That Bernice Pauahi Bishop died on the 16th day of October 1884 after having made and executed her last will and testament and two codicils. That said will and codicils were duly admitted to probate in the supreme court of the Hawaiian islands on December 2, 1884. That in said will and codicils the property described

in royal patent No. 3578 was devised to Charles R. Bishop for the term of his natural life, remainder to the trustees under said will and their successors, plaintiffs herein.

Originals Nos. 1 and 2, and facts Nos. 1, 2 and 3 are hereby admitted.

ROBERTSON & WILDER,
Of Counsel for Defendant.

Dated July 5, 1902.

(Endorsed and filed July 5, 1902.)

12 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Special July Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, Plaintiffs, *vs.* THE TERRITORY OF HAWAII.	Action to Establish Fishing Right.

Plaintiff's Bill of Exceptions and Agreed Case.

Be it remembered that the above entitled cause came on for hearing at this special July term, 1902, of this court:

1. It was admitted by counsel for defendant that plaintiffs have the legal title to the land of Waialae 'iki situated in the district of Kona, island of Oahu, according — the admissions of fact on file in said cause, which admissions are made a part hereof.

2. Plaintiffs offered in evidence royal patent No. 3578 for the land at Waialae 'iki, issued to A. Paki under whom plaintiffs claim title. Said patent is made a part of this bill of exceptions.

3. Plaintiffs claim to be entitled to a sea fishery as set out in plaintiffs' complaint, as appurtenant to said land at Waialae 'iki. The fishery claimed is not mentioned or referred to in said royal patent No. 3578.

4. Defendant's counsel thereupon called for the production of land commission award upon which patent No. 3578 was issued
13 and the proceedings before the land commission for the purpose of showing that no right of sea fishery as appurtenant to said land of Waialae iki or otherwise was claimed by the awardee before the board of land commissioners. Plaintiffs objected to the introduction of said land commission award and said proceedings on the ground that the same was irrelevant, incompetent and immaterial and on the ground that the royal patent was the final act in regard to the title to said premises and that it was incompetent to go back of said patent for any purpose. The objection of the plaintiffs was overruled and an exception taken, and allowed, by the

aintiffs to such decision. Said land commission award, the same ing No. 10613 is made a part of this bill of exceptions.

5. The plaintiffs claim to have acquired a vested right in said hery by virtue of the laws of the Kingdom of Hawaii respecting a fisheries and by virtue of the common law of Hawaii and of cient custom in Hawaii. In support of this claim plaintiffs offered prove that for a period of sixty years plaintiffs, and those under hom they claim title, have been in possession of the sea fishery of 'aialae iki, described in plaintiffs' complaint, claiming title to the me; that said possession so far as the konohiki right is concerned id been continuous, exclusive and notorious for said period, and nder a claim of right; that the rights claimed to said fishery con- sted of the right each year to set apart for themselves for their sole id exclusive use within the fishing grounds, according to the metes id bounds set out in said complaint, one given specie- or veriety of sh natural to said fishery, giving public notice of the kind and de- ription of the fish so chosen or set apart, and also the right in lieu f setting apart some particular fish for their exclusive use, to pro- hibit upon consultation with the tenants of their lands all 4 fishing within the fishing grounds within the metes and bounds above set forth during certain months of the year and urin the fishing season to exact from each fisherman one-third of ll the fish taken from said fishing grounds.

The court excluded said testimony as incompetent, irrelevant and nmaterial, to which ruling the plaintiffs duly excepted and their xception was allowed.

6. Plaintiffs thereupon offered to prove that from time immemorial hat by Hawaiian custom and that by the common law of Hawaii, rior to the passage of the act of June 7, 1839 relating to fisheries, a imilar right to the sea fishery of Waialae'iki had been held and en- oyed by those under whom plaintiffs claim title as appurtenant to aid land of Waialae'iki.

This offer to prove was rejected as incompetent, irrelevant and nmaterial, to which ruling plaintiffs duly excepted and their ex- eption was allowed.

7. The plaintiffs thereupon offered to prove that prior to the en- ctment of June 7, 1839 relating to fisheries, that rights similar to hose set out in said statute from time immemorial had been enjoyed y those under whom plaintiffs claim the title to the land of Wai- lae'iki, as appurtenant to said land; and that said rights has been penly, continuously and notoriously asserted and exercised under laim of title, to the exclusion of all other persons.

The presiding judge ruled this evidence to be incompetent, irrel- vent and immaterial, to which ruling the plaintiffs duly excepted, nd their exception was allowed.

8. The presiding judge thereupon ruled that no vested rights could be acquired in sea fisheries in Hawaii as against the Territory 5 of Hawaii by virtue of any occupation or custom of *of* the country or of any statute of Hawaii respecting fisheries to

which ruling the plaintiffs duly excepted and their exception was allowed.

9. Thereupon the presiding judge ruled that upon the repeal of the laws of Hawaii respecting fisheries, by the organic act the plaintiffs' rights in said fishery became terminated.

To this ruling plaintiffs duly excepted and their exception was allowed.

10. The presiding judge thereupon ordered judgment entered for the defendant, the parties having waived trial by jury, to which order ruling and judgment the plaintiffs duly excepted and their exception was allowed.

All pleadings and papers on file in this cause are made a part of this bill of exceptions.

Dated this 17th day of July, 1902.

The above bill of exceptions being found conformable with the truth is hereby allowed.

A. S. HUMPHREYS,
First Judge of the Circuit Court
for the First Circuit.

HATCH & SILLIMAN, For Pl'ffs.
ROBERTSON & WILDER,
For Defendant.

(Endorsed and filed July 17 1902.)

16 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

J. O. CARTER ET AL., Trustee-,
v.
THE TERRITORY OF HAWAII. } Request for a Substitute Justice.

To Hon. J. T. De Bolt:

Mr. Chief Justice Frear and Justice Perry being disqualified to sit with me in the above entitled cause, I the remaining justice of the supreme court, hereby request and authorize you to sit with me and hear and determine the said cause.

Dated the 6th day of October 1902.

C. A. GALBRAITH.

Attest:
GEORGE LUCAS, Clerk.

(Endorsed and filed Oct. 6, 1902.)

17 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

J. O. CARTER ET AL., Trustees,
v.
THE TERRITORY OF HAWAII. } Request for a Substitute Justice.

To Hon. W. J. Robinson:

Mr. Chief Justice Frear and Associate Justice Perry being disqualified to sit with me in the above entitled cause, I, the remaining justice of the supreme court, hereby request and authorize you to sit with me and hear and determine the said cause.

Dated the 6th day of October 1902.

C. A. GALBRAITH.

Attest:
GEORGE LUCAS, Clerk.

(Endorsed and filed Oct. 6, 1902.)

18 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased,
v.
THE TERRITORY OF HAWAII.

SAMUEL M. DAMON
v.
THE TERRITORY OF HAWAII.

Exceptions from Circuit Court, First Circuit.

Submitted October 7, 1902; Decided November 15, 1902.

Galbraith, J., J. T. De Bolt, circuit judge, in place of Frear, C. J., disqualified, and W. J. Robinson, circuit judge, in place of Perry, J., disqualified.

The Hawaiian statutes giving konohikis or landlords special privileges in the sea fisheries adjoining their land were not grants of property or covenants in the nature of grants but were public statutes in which no one could acquire a vested right.

The phrase "private property" used in these statutes denoted no more than the special rights or privileges given by the law over the sea fishery.

When the statutes were repealed by the organic act the konohiki or landlord no longer had any "private property" in such fishery.

19 Exclusive rights in a sea fishery surrounding these islands could not be acquired by prescription or ancient custom.

The konohiki's or landlord's "private property" in the sea fishery could not pass as an appurtenance to the land.

A royal patent containing, after the description of the land conveyed and before the habendum clause, a recital that "there is also attached to this land a fishery right in the sea adjoining" without express words of grant referring to the fishery does not convey any right in the fishery.

Opinion of the Court by Galbraith, J.

The plaintiffs commenced these actions under section 96 of the organic act for the purpose of establishing an exclusive right to the fisheries of Waialae-iki and Moanalua, island of Oahu.

In the first case the plaintiffs, as trustees of the Bishop estate, claim a vested right as sole and exclusive owners in fee simple of the sea fishery, same not being a pond or artificial enclosure, situated within the reef adjoining the land of Waialae-iki, setting out a description by metes and bounds; and further allege in their petition that plaintiffs' claim consists of the right each year to set apart for themselves for their sole and exclusive use within the fishing grounds described, one species or variety of fish natural to said fishery, giving pub-
20 lic notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit, upon consultation with the tenants of their land, all fishing within such fishery during certain months of the year; and during the fishing season to exact from each fisherman one third of all the fish taken upon said fishing ground; that from time immemorial the plaintiffs and their grantors by ancient custom and prescription have had an exclusive fishery within the bounds set out, subject only to the rights * * * of tenants on the land of Waialae-iki; that the said fishery was originally appurtenant to the land of Waialae-iki awarded to A. Paki by Apana 3 of land commission award No. 10613 and confirmed by royal patent No. 3578; and that plaintiffs claim an absolute estate in fee simple in said fishery by purchase under various mesne conveyances.

In the second case the plaintiff makes a similar claim to the fishery situated at Monalua and sets up and additional ground for the claim of right, *i. e.*, that the said fishery was confirmed to L. Kamehameha by royal patent No. 7858 under whom the plaintiff claims an absolute estate in fee simple in said fishery by purchase by various mesne conveyances, devise and descent.

The cases were tried to a jury in the circuit court. In the first the judge granted defendant's motion for non-suit at the close of

plaintiffs' evidence. In the second a verdict was directed for the defendant. The plaintiffs excepted and come to this court on bills of exceptions. The cases were tried argued & submitted together.

In the first case the claim of plaintiff is based on three grounds, to wit: (1) That the right claimed is an appurtenance to their land; (2) that it is based on prescription or (3) on ancient Hawaiian
21 custom while in the second case these three grounds are relied on and an additional claim for the right is made *i. e.* a grant from the king.

It is contended on behalf of the Territory, and the ruling of the circuit judge seems to have been based on this theory, that in the second case the patent for the land of Moanalua does not grant the fishery to the patentee and in both cases that the plaintiffs did not and could not acquire an exclusive right in the fisheries by prescription or by ancient custom, and that whatever right they enjoyed in the fisheries on June 14th, 1900, the time of taking effect of the organic act, was derived from the Hawaiian statutes on the subject of fisheries and that these were public statutes or laws under which no one could acquire a vested right and that when the statutes were repealed all of the rights and privileges of the plaintiffs in the said fisheries were abrogated and annulled.

The provisions of the organic act on the subject are as follows:

"SECTION 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights. but no such vested rights shall be valid after three years from the taking effect of this act unless established as hereinafter provided."

"SECTION 96. That any person who claims a private right to any fishery shall, within two years after the taking effect of this act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.
22 That if such fishing right be established, the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated."

The question of greatest difficulty presented by these cases is to determine whether or not the rights of the plaintiffs in the respective fisheries were properly "vested rights" within the saving clause of section 95, of the organic act.

By the common law the title and dominion of the sea and navigable rivers and arms of the sea within the territorial jurisdiction were in the king who held the same in trust for his subjects who had a common right of navigation and fishery therein. This jurisdiction was held to extend one marine league from the beach at low water mark. 2 Blackstone 52; Gould on Waters sec. 3; Rogers *vs.* Jones, 1 Wend. 237 at 256; Shivley *v.* Bowlby 152 U. S. 1. The King *v.* Parish, 1 Haw. 58.

Although the claim to an exclusive right in a sea fishery has been the subject of much litigation and of conflicting decision the weight of authority seems to hold that at common law such a right might be acquired by grant or by prescription which presumes a grant. Gould on Waters § 189 and cases cited in note: Rogers *v.* Jones, *supra:*

The supreme court of New York has held that by the common law the king had the right to grant the soil under navigable water, and with it the exclusive right of fishery. Brookhaven *v.* Strong, 60 N. Y. 56. A grant made by a colonial governor and confirmed by act of assembly was held to vest the title to an exclusive
23 fishery in the grantee. Robins *v.* Acherly, 91 N. Y. 98. The holding of the New York courts on this question was followed by the Supreme Court of the United States in Lowndes *v.* Huntington, 153 U. S. 1.

It is said by Woodworth, J., in case of Rogers *v.* Jones, *supra*, "it is well known, that numerous grants have been made from time to time by the commissioners of the land office of lands under the waters of the Hudson, all which have proceeded on the ground that it was the undeniable right of the people of this State to make such grants. Until very lately, I have not understood that the power was questioned. It is here proper to observe that this principle does not at all conflict with the doctrine laid down by writers on national law, who declare the air, running water, the sea, etc., are common property (Vattel, B. 1. ch. 23, sec. 280, 287. Grotis, B. 2 ch. sec. 3). The same writers, however, admit that the various uses of the sea near its coast render it very susceptible of property; and rivers are susceptible of property, because confined in banks; such places may be appropriated by the people to whom they belong and the productions within reach, in the same manner as the land they inhabit." P. 156.

Kamehameha III, who ruled the Hawaiian islands before there was any written laws or constitution, as well as after the adoption of a written constitution was in the fullness of the common law phrase "the universal lord and original proprietor of all lands in his kingdom." He was the source of title. He could give and take from. His will was law and none of his subjects held allodial titles prior to 1840. There is little, if any, doubt that he had the power to grant exclusive fisheries to any of his subject- if he desired to do so (Territory *v.* Liliuokalani, ante, 88; Brown *v.* Spreckels, ante,

400), although there is a declaration by Chief Justice Judd
24 that tends strongly to indicate that this court at time (1899) held to the contrary view. "The people of Hawaii" said the chief justice, "hold the absolute rights to all its navigable waters and the soil under them for their own common use. See Martin *v.* Waddell, 14 Pet. 410. The lands under navigable waters in and around the Territory of the Hawaiian government are held in trust for the public use of navigation. Stockton *v.* Baltimore & N. Y. R. R. 32 F. 9." King *v.* Oahu Railway & Land Co. 11 Haw. 725.

Admitting that the plaintiffs might have obtained the right claimed by grant the question arises. Did they acquire such right? Such a grant would be against the public and under the well established rule of construction requiring all such grants to be construed most strongly against the grantee it follows that such right if it exists must appear by express terms of the grant.

Much was said at the hearing and in the briefs relative to these island- surrounded by the sea, teeming with food for the inhabitants, and of the relative importance of the products of the sea to the life of the people over those of the land. All this was and is of much interest but it does not appear how it in any material way leads to a solution of the issues presented. Since it appears that whatever the customs may have been or the rights and privileges enjoyed by the chiefs, nobles and common people in the fisheries prior to the year 1839, at that time they were all revoked and cancelled, and a statute passed to regulate and govern them.

The first written law on the subject of fisheries in these islands was adopted by the king, nobles and chiefs on the 7th day of June 1839. In this statute it is declared that,

"His Majesty the King hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords, and a portion he reserves to himself." And further that,

25 "These are the fishing grounds which His Majesty the King takes and gives to the people: The fishing grounds without the coral reef, viz: the Kilohee grounds, the Lóhee grounds, the Malolo grounds together with ocean beyond.

"But the fishing grounds from the coral reef to the sea beach are for the landlords and for the tenants of their several lands but not for others."

An examination of this act (chap. III, Laws of 1839) will show that it was intended to govern the subject of fisheries completely. Experience demonstrated that it was incomplete and various amendments were adopted on April 1st, 1841. Again in 1845 another act was passed on the subject more clearly defining the rights of the several parties. Section 1 of this act defines the fishing ground of the people to be "the entire marine space without and seaward of the reef upon the coast of the several islands," etc. Section II of this act reads, "The fishing grounds from the reefs, and where there happens to be no reefs from the distance of one geographical mile

seaward to the beach at low water mark, shall in like manner b considered private property of the landlord whose lands by ancien regulation belong to the same; in the possession of which privat fisheries the said landlords shall not be molested except to the exten of the reservations and prohibitions hereinafter set forth.

"SEC. III. The landlord shall be considered in like manner t hold said private fisheries for the equal use of themselves and of th tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions i this article imposed."

The other sections give the landlords the right each year to se apart for themselves one specie or veriety of fish natural to th fishery and to give public notice of this fact by proclamation
26 etc., and fixing penalties against landlord and tenant for vio- lation of the act. Also defines the species of fish designated as the royal fish and that these shall appertain to the government and for a division of these between the king and the fishermen, and extensive provisions relative to the "king's tabu" etc.; providing for the appointment of fisheriey agents to "exact and receive of all fisherman for the use of the royal exchequer during the legalized fishing seasons the one-half part or portion of all protected fish taken without the reefs," etc.

Time and experience demonstrated to the satisfaction of the king that it was not profitable for the government to engage in the fishing business so on July 11, 1857, the king approved an act granting to the people the rights of piscary belonging to the government. The second section of this act reads: "Sec. 2. All fishing grounds pertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be and are hereby forever granted to the people for the free and equal use of all persons; provided, however, that for the protection of such fishing grounds the minister of the interior may tabu the taking of fish thereon at certain seasons of the year."

Another act the same year (1851) was passed entitled "An act to protect the people in certain fishing grounds," and reads in part as follows:

"SECTION 1. That no person who had bought or who may hereafter buy any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom over any fishing grounds not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior.

"SECTION 2. If that species of fish which has been tabooed
27 by any konohiki shall go into the grounds which have been or may be given to the people, such fish shall not be tabooed them. It shall only be tabooed when caught within the bounds of the konohiki's private fishery. Nor shall it be lawful for

a konohiki to taboo more than one kind of fish upon any fishing grounds which lie adjacent to each other."

The Civil Code of 1859 embraced all the laws then in force in the islands on the subject of fisheries. Section 384 of the Civil Code is a verbatim copy of sec. 2 of the act of 1851 above quoted and sec. 387 is a copy of sec. II of the act of 1845 except the word "konohiki" is substituted for the word "landlord" used in the original enactment. The other sections hereinbefore quoted were included in this chapter of the Civil Code. All of these laws without material change were carried forward and are published as chapter 84 of the Penal Laws of 1897. These statutes on the subject of fisheries have been in force some of them for more than half a century and all of them for most of that time, until repealed by sec. 95 of the organic act, June 14, 1900.

It seems clear from a review of these statutes that the following inferences are irresistible, to wit, that the plaintiffs cannot base any claim to the fisheries on ancient custom or prescription; that no right that they may have possessed can antedate the act of 1839; that all right in the fisheries of whatever nature that had been enjoyed by any subject prior to that date was revoked and annulled by said act and that all claims must now date from the act of 1839 or from some subsequent date.

There are only two grounds remaining on which the plaintiffs might sustain their claim, to wit: (1) that it is based on grant or (2) was an appurtenance to the land.

It is argued that these statutes are in the nature of grants and are sufficient to vest title to the fisheries in the landlords and
28 that the word "give" used in the act of 1839, is a word of conveyance and was sufficient to pass title to the fisheries from the king to the konohiki and that the title so conveyed become a vested right within the meaning and intent of sec. 95 of the organic act.

We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes themselves bear conclusive evidence that they were not intended as grants of property and that they were not intended to be more than appears from their plain terms, to wit, grants of special privileges to persons who then were or might become landlords.

The statute of 1851 granting to the people certain rights of piscary shows a clear intent to make a grant both in the title and body of the law. Words of grant are used. "All fishing grounds," etc. "shall be and are hereby forever granted." If it had been the intention to convey an absolute right of property to the landlords by the other statutes, it seems that suitable words of grant would have been employed. That such words were not used can only be explained on the theory that a grant was not intended, and so we construe the statutes.

It is contended that the fishery was an appurtenance to the land

and passed by deed or patent without special reference thereto in the conveyance.

The statute declares the fisheries within the reefs and for one mile from shore where there is no reef to be the "private property" of the konohiki or landlord. We understand the word *property* to be used in this statute in a general sense meaning dominion over a thing. (1 Blackstone, 122; 2 *id.* 1.) "The word 'property' 29 although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, means only the *rights* of the owner in relation to it. It denotes a right over a determinate thing." Andrew's Am. Law, sec. 96.

The phrase "private property" used in the law cannot mean more than the rights which the statute gave to the konohiki or landlord over the fishery and such private property could not be said to be held by contract or any covenant in the nature of a contract.

A parallel is sought to be drawn between the fishery statutes and the United States statutes permitting settlers to take up home- on the public domain. The analogy is not apparent. There is a wide distinction between the statutes and the rights that may be acquired under them. The United States homestead statute is not self-executing nor is it a grant of land to the homesteader. It provides a method by which a qualified person who complies with the terms prescribed may acquire title to land. The title passes from the Government to the homesteader when the patent issues and not before. Shiver *v.* The United States, 159 U. S. 491. Again the one statute relates to land that may be possessed, occupied, cultivated and improved with buildings and structures while the other relates to water, not water passing with the soil under it or confined within bounds but water in the open sea, changing with the rising and ebbing of the tide; it gave no right to the land under the water or to place any structure or improvement thereon not even to anchor a house-boat but a right to take fish from this area of water if caught while there, a mere theoretical species of property at best.

If the "private property" possessed by the konohiki in the fishery was the only right given by the statute then it follows that when the statute was repealed there was no further claim of "private property" in the fishery, because that which gave the right or "private property" was no longer in existence. In this view and, we take it to be the correct view, the plaintiffs could acquire no vested 30 right in the fishery. While the statutes were in force plaintiffs' private property in the fishery was protected but when they were repealed there was no property in the *res*. These statutes were general laws. "Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by change in the law." Cooley, Const. Lim., p. 343.

Again the same author says:

"In organized society every man holds all he possesses and looks

forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense." Cooley, p. 437. * * *

"All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they became divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order." *Id.* p. 438.

This view is in perfect harmony with the contemporaneous construction placed on these statutes in the leading case on the subject in this court, Haalelea *v.* Montgomery, 2 Haw. 62. In this case Mr. Justice Robertson said that the landlord "could have transferred the fishery, or her right therein, only by an express grant
31 *eo nomine*. Had she made a deed of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee." P. 70. * * *

And again, "If any person who has acquired a kuleana on the Ahupuaa of Honouliuli should sell and convey his land, or even a part of it to another, a common right of piscary would pass to the grantee as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance, it would pass as an incident. Here, we think, is the great distinction between the rights of the konohiki and those of the tenants or occupants, for while the former holds the fishery as his private property the latter has only a right of piscary therein as an incident of his tenancy." *Id.* p 71. Here it is declared that the konohiki's or landlord's rights in the fishery are private property and as such could not pass as an appurtenance to the land; that in order to convey it specific words of grant must be used in the conveyance for that purpose. This decision was rendered in 1858, one year before the adoption of the Civil Code and its correctness, so far as we are advised, is now questioned for the first time. It is contended that this part of the decision is mere dicta and was not involved in a decision of the issues in that case. Even if this be true it does not appear how that fact would weaken the declaration as a correct interpretation of the theory of the law on which fishery rights in these islands are based. The decision was by Mr. Justice Robertson whom the late Chief Justice Judd declared to be

"our best authority" on early Hawaiian tradition, history and jurisprudence. It appears to have been accepted by the bench and bar of the islands as a correct declaration of law of the question for most half a century and no sufficient reason has been advanced to warrant us in questioning its correctness at this time.

32 This construction of the statute is further supported by the fact that the land commission although given authority to award "rights of piscary" by statute creating it, (Statute Laws, vols. I and II, sec. 7, p. 109), refused to award fisheries either as "rights or territory," except in a very few instances, leaving the parties to their rights under the general statutes. Akeni *v.* Wong Ka Mau, 5 Haw. 91. It is also confirmed by the language found in the first section of the act of May 24, 1851, passed to protect the people in certain fishing grounds forbidding anyone who had acquired government lands from exercising exclusive rights "over any fishing ground *not included in his title*, although adjacent to said lands." This inhibition was carried forward into the Civil Code of 1859 as sec. 393, and into the penal laws of 1897 as sec. 1458.

We do not understand that any of the adjudicated cases in this jurisdiction are opposed to this theory.

It was held that the konohiki or landlord had no power to alienate a single right given by law to the tenant in a sea fishery. Oni *v.* Meek, 2 Haw., 87.

Also that although the land commission heard evidence relative to the boundaries of the fisheries claimed by the konohiki and refused to award the fishery either as a right or territory and although the konohiki of the adjoining land was present at the hearing still he was not estopped from disputing the boundary of the sea fishery claimed to be shown by such evidence. Akeni *v.* Wong Ka Mau, 5 Haw., 91.

While in Shipman *v.* Nawahi, 5 Haw., 571, the fishery is spoken of as "adjoining and appurtenant to plaintiff's land called Waiakea," the action was for damages for trespass upon the fishery. Judgment was for the plaintiff in the court below, but on appeal it appeared that the defendant had a kuleana in the land of Waiakea hence a right to fish and a new trial was ordered.

33 The case of Judd *v.* Kuanalewa, 6 Haw., 329, was an action of ejectment by one landlord against another for possession of a fishery. It was found that there had been a division of the fishery by the parties and judgment was rendered accordingly.

Hatton *v.* Piopio, 6 Haw., 334, was an action against a tenant for unlawfully catching and selling fish, it was held that "under our fishing laws every resident on a land has the right to fish in the sea appurtenant to the land and to sell the fish caught by him."

Shipman *v.* Com'rs of Crown Lands, 6 Haw., 351, was a suit in equity by the plaintiff's lessees of a sea fishery seeking an injunction to restrain the defendant from trespassing and fishing. It was held that no irreparable damage was shown and that there was an

adequate remedy at law both by an action of damages and also under the statute by criminal proceedings. Injunction refused.

These we understand to be the principal decisions of this court construing the fishery statutes. While in some of them the fishery is spoken of as being "appurtenant to the land" and as "an appurtenant of the land" still in no one of them does the court in the slightest degree detract from the force of the law announced in Haalelea *v.* Montgomery or attempt to overrule the law there declared that a sea fishery could not pass an an appurtenance to the land. As a matter of fact the fishing rights were appurtenant to the land so long as the statutes were in force but when the statutes were repealed these appurtenants were such no longer.

"Fish in the open sea are animals *feræ naturæ*, and go and come at will unrestrained." (Hatton *v.* Piopio, 6 Haw., 337) but when taken fish were private property and entitled to the protection of the law. It was entirely proper for the legislature to prescribe penalties for violation of the fishing statute and for the courts to
34 entertain civil actions for damages for trespassing against the rights given by statute.

In the second case the claim of grant is based upon a clause in the patent for the land of Moanalua. It appears in the patent after the operating words of grant and the description of the land conveyed that there there is a recital relative to the fishery as follows, to wit: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows." Then a description of the fishery claimed in the petition is set out by metes and bounds. The habendum clause of the patent reads in part: "To have and to hold the above granted land, in fee simple, unto the said Lot Kamehameha," etc. The patent was a grant of land. The operating words of grant are not enlarged by the habendum clause. The fishing right was not land or a necessary part thereof. The word "attached" cannot be construed as a word of grant or as showing an intention to convey. It does not appear from the patent that it was the intention of the grantor to convey the fishery. The recital relative to the fishery may have been inserted for the purpose of making plain the boundaries of the fishery adjoining the land and in which the statute gave the landlord special privileges. The plaintiffs, it seems, took this view of the matter as the evidence shows that he exercised the right in the fishery under the statute.

Under the common law the right of fishing in the open sea like that of navigation was a public right. The grant of an exclusive right to a sea fishery cannot be presumed. Every presumption is against the grant and in favor of the public. Every ambiguity or doubt in the instrument by which the right is claimed to be granted will be construed most strongly against the grantee.

35 Rapid Transit Co. *v.* Tram. Co. 13 Haw. 363, 371; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Newton *v.* Commissioners, 100 U. S. 548; Shivley *v.* Bowlby, 152 U. S. 1.

Applying this well established rule of construction to the facts, we are bound to hold that the patent to the land of Moanalua did grant the sea fishery adjoining.

Exceptions are overruled.

C. A. GALBRAITH.
J. T. DE BOLT.
W. J. ROBINSON.

Hatch & Silliman, for the plaintiff.
Cecil Brown and Magoon & Peters, on brief.
Robertson & Wilder, for defendant.

(Endorsed and filed Nov. 15, 1902.)

36 In the Supreme Court of the Territory of Hawaii, October Term, 1902.

JOSEPH O. CARTER, WILLIAM F. ALLEN, William O. Smith, Samuel M. Damon, and Alfred W. Carter, Trustees under the Will of Bernice P. Bishop, Deceased, Plaintiffs,
vs.
THE TERRITORY OF HAWAII, Defendant.
} Action to Establish Fishing Right.

Judgment.

This cause came on to be heard at the October term, 1902, of this court before the Honorable C. A. Galbraith, associate justice of this court, and the Honorable John T. De Bolt, first judge of the circuit court for the first circuit, sitting in the place of the Honorable W. F. Frear, chief justice of this court disqualified by interest, and the Honorable W. J. Robinson, third judge of the circuit court for the first circuit, sitting in the place of the Honorable Antonio Perry, associate justice of this court, disqualified by interest, on the plaintiffs' bill of exceptions to rulings of the circuit court for the first judicial circuit, Territory of Hawaii, and was argued by counsel for plaintiff and defendant:

It is considered by the court and it is now ordered and adjudged that the decision of said presiding circuit judge ordering judgment entered for the defendant above named be and the same is hereby confirmed, and the exceptions taken by the plaintiffs as set out in said bill of exceptions are disallowed with costs.

By the court.

[SEAL.] GEORGE LUCAS, Clerk.

(Filed Dec. 1/02.)

37 This indenture made this first day of February, A. D. 1890, by and between Charles R. Bishop of Honolulu, island of Oahu, Hawaiian islands, of the first part, and Charles (2 stamps.) R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and Joseph O. Carter, all of said Honolulu, trustees under the will of Bernice Pauahi Bishop, of the second part; witnesseth:

That the party of the first part in consideration of one dollar to him paid by the parties of the second part, the receipt whereof is acknowledged, hath remised, released and forever quitclaimed, and by these presents doth remise, release and forever quitclaim unto said parties of the second part, their heirs, successors and assigns, all of his right, title, interest estate and possession in and to all of the tracts and parcels of land described as follows, viz:

1. All of that lot on the corner of Richards and Queen streets in Honolulu, known as the Akahi premises, described in royal patent No. 3609.

2. All of that land at Manoa, Oahu, known as the Akahi lot described in royal patent 1262.

3. The Ahupuaa of Keei situated in South Kona, Hawaii, described in land commission award 5368 to Akahi, royal patent 7733.

4. The land known as Puuepa situated in North Kohala, Hawaii, described in royal patent No. 7730 to Akahi, now leased to J. Wight.

5. The Ahupuaa of Makalauena situated in North Kona, Hawaii, described in royal patent 7731 to Akahi.

6. The Ili of Ulupalua situated in North Kohala, Hawaii, described in royal patent 7734 to Akahi.

38 7. The Ili of Waialae-nui situated in the district of Kona, Oahu, described in royal patent 4475.

8. The Ili of Waialae-iki situated in said district of Kona, described in royal patent 3578, reserving however the paddock which is reserved in the lease now outstanding upon said premises.

9. The Ili of Maunalua situated in said district of Kona, Oahu, described in royal patent 4475.

10. The Ahupuaa of Heeia situated at Koolaupoko, island of Oahu, described in royal patent 1664.

11. All of the parcels of land known as Laimi situated in Nuuanu valley, Oahu, described in royal patent- Nos. 706 and 707.

12. All of that Kuleana in Kalawahine, Honolulu, described in royal patent 708.

13. All of those lots at Kamanuwai on Beretania street in Honolulu, described in royal patent 293.

14. All of those two lots on Maunakea street in Honolulu, described in royal patent 4382.

15. All of that lot on Richards street known as the Kekela lot, described in royal patent 300.

16. The Ili of Kalauao situated in the district of Ewa, Oahu, described in royal patent 1963.

17. All of that lot at Pakala, Lahaina, Maui, described in land commission award 300.

18. The Ahupuaa of Keei situated in South Kona, Hawaii, described in land commission award 5524 to Konia, R. P. 6633.

19. The land known as Paauau situated in Kau, Hawaii, now leased to the Hawaiian Agricultural Company.

20. All of the lot known as the Rathburn lot situated at Kaumakapili, Honolulu, described in deed of record in Liber
39 28, folios 398–399.

21. All of that lot situated at Kaumakapili, Honolulu, described in deed from Jacinto Diaz to Chas. R. Bishop, dated July 13th, 1879, of record in Lib. 40, fol. 106–107.

22. All of the land known as Kalia situated at Waikiki, Oahu, described in land commission award 104, being Fort lands, and all other lands at said Waikiki, being a portion of the estate of Bernice Pauahi Bishop; excepting and reserving however all of those portions of the same extending on the Waikiki road from the Apuakehau stream northerly to the corner where the road running makai to the residence of J. F. Brown and others begins, and including in this reservation all of the enclosures used by the party of the first part as a sea side residence and for pasturage etc.; the land hereby conveyed being all of that lying westerly of boundaries shown by a red line on a map of "A portion of Kalia, Waikiki, made by J. F. Brown, July 1888," which map is numbered 139 in the list of maps of said estate.

And also all of the rents, reversions, remainders, rights privileges and appurtenances to the said premises appertaining.

To have and to hold, except as above reserved and subject to existing leases to them, said parties of the second part, their heirs, successors and assigns forever.

And the party of the first part doth declare that any possession he may have of said granted premises, except as reserved, shall be as one of said trustees and on their behalf.

In witness whereof said party of the first part has hereunto set his hand and seal the day and year first above written.

CHAS. R. BISHOP. [SEAL.]

40 HAWAIIAN ISLANDS, } ss:
Island of Oahu, }

On this 25 day of Feb'y A. D. 1890 personally appeared before me Chas. R. Bishop to me known to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

JOHN H. PATY,
[SEAL.] Notary Public.

(Recorded in Liber 122 pp. 182, 183, 184.)

No. 3578.

Royal Patent.

Upon Confirmation of the Land Commission.

Whereas, the board of commissioners to quiet land titles have by heir decision awarded unto A. Paki (No. 10613 part 3) an estate of reehold less than allodial, in and to the land hereafter described, nd whereas the government has relinquished its right in this land, ithout commutations.

Therefore, Kamehameha, by the grace of God, King of the Hawaiian slands, by his royal patent, makes known unto all men, that he has, or himself and his successors in office, this day granted and given bsolutely, in fee simple, unto A. Paki all that certain piece of land situate at Waialaeiki, Ili of Waikiki in Kona in the island of Oahu, nd described as follows:

Commencing at the S. E. angle of the property on the sea shore at a yellow colored stone, at the end of the wall of Wailupe fish pond—he boundary runs along the land of Wailupe N. 10° 34′ W. 1709 eet to the top of a ridge, thence N. 12° W. 4180 feet, thence in a ent line as shown on plan, along ridge to a point N. 36° W. 715 eet, thence N. 7° 56′ E. 353 feet thence N. 25° 40′ W. 1180 feet to he top of hill, thence along ridge N. 18° 30′ W. 693 feet—thence in a bent line along ridge N. 1° 16′ E. 853 feet, thence in a bent line long ridge N. 34° 40′ W. 466 feet, thence N. 2° 10′ E. 306 feet—hence N. 32° 25′ W. 615 feet to summit of ridge—thence up along idge in a northerly direction to the summit of high ridge, the boundary of Koolau, and along high ridge in a N. westerly direction to the head of the stream, named " Kapakahi "—thence down along Kapakahi, bounded by the land of Waialaenui to a oint 1113 feet in a straight line below the end of a stone wall on he stream, at the mouth of, and 57 feet, above, the fork of the tream in the flat, thence S. 74° 40′ W. 108 feet, thence N. 87° 50′ V. 1541 feet, thence N. 53° 6′ W. 1887 feet—thence N. 74° 30′ W. 423 feet—thence S. 52° 24′ W. 857 feet—thence N. 63° 45′ W. 375 eet—thence along the land of Palolo & Kapahulu S. 14° 22′ W. 820 feet—thence in a bent line along footpath bounded by Vaialaenui, N. 81° E. 585 feet—thence in a bent line along foot-ath N. 70° 13′ E. 595 feet—thence in a bent line along old track . 78° 33′ E. 1610 feet—thence along old track N. 86° 34′ E. 652 eet—thence along old track N. 74° 57′ E. 619 feet, thence in a bent ine along footpath S. 89° 40′ 2984 feet to middle of Kapakahi tream, 155 feet below the point where the other boundary left the tream—thence down along stream 748 feet, thence N. 41° 27′ E. 76 feet—thence S. 52° 10′ E. 268 feet—thence S. 46° W. 663 feet to iddle of stream—thence down along stream 670 feet—thence N.

52° 35′ E. 260 feet—thence N. 38° 12′ E. 670 feet thence N. 45° 48′ W. 179 feet—thence S. 46° 43′ W. 127 feet to old wall—thence along old wall N. 56° 23′ W. 277 feet to a stone wall—thence in a bent line along wall N. 33° E. 586 feet to point marked B. on plan—thence in a bent line S. 76° 40′ E. 168 feet—thence N. 27° 28′ E. 69 feet—thence in a bent line S. 67° 20′ E. 180 feet to point marked A on plan—thence S. 79° 48′ E. 233 feet—thence in a bent line S. 19° 32′ W. 149 feet—thence S. 55° 51′ E. 152 feet to a stream—thence in a bent line along stream S. 43° W. 458 feet—thence S. 53° 38′ W. 152 feet—thence in a bent line S. 6° 18′ W. 285 feet—thence N. 83° 30′ E. 31 feet—thence S. 16° E. 174 feet to east side of stream—thence along side of stream S. 16° 15′ W. 287 feet—thence S. 30° 30′
43 W. 238 feet—thence S. 33° 20′ E. 630 feet to the mouth of the stream Kapakahi, at the sea side—thence along sea side in an easterly direction to point of commencement.

Also a detached piece of kalo land commencing at a point S. 4° 5′ W. 123 feet from the point marked A. the boundary running S. 35° 45′ W. 155 feet—thence N. 55° 9′ W. 76 feet—thence in a bent line N. 23° 25′ E. 166 feet—thence in a bent line S. 50° 30′ E. 112 feet to commencement. Area 37/100 acres.

The first description includes two pieces of land belonging to Waialaenui No. 1 & 2 on plan.

No. 1. Commencing at a point N. 21° 14′ W. 46 feet from point marked A. the boundary runs in a bent line N. 13° 41′ E. 74 feet—thence S. 81° E. 261 feet thence S. 10° 26′ W. 74 feet—thence N. 80° 35′ W. 266 feet to commencement. Area 43/100 acres.

No. 2. Commencing at a point on the stone wall N. 17° E. 266 feet from the point marked B. on plan, the boundary runs in a bent line S. 71° E. 186 feet—thence in a bent line N. 27° 36′ E. 265 feet—thence N. 41° 15′ E. 35 feet to the east side of a stream—thence along side of stream S. 37° 50′ E. 135 feet—thence N. 89° 15′ E. 126 feet—thence N. 26° 38′ W. 118 feet—thence in a bent line N. 54° 34′ E. 373 feet to side of a stone wall—thence N. 49° W. 326 feet—thence N. 73° 22′ W. 236 feet to point marked C. on plan—thence S. 53° 25′ W. 193 feet—thence N. 71° 40′ W. 37 feet—thence in a bent line along side of pond to a point on a stone wall S. 35° 10′ W. 315 feet thence S. 29° 32′ E. 48 feet—thence S. 44° 40′ W. 287 feet—thence S. 69° 48′ E. 219 feet to commencement. Area 8 88/100 acres.

Total area of Waialaeiki.....	$1608\frac{3}{10}$ acres.
Less, reservation, for claim of Victoria.....	$217\frac{3}{10}$ "
	1391 acres.

44 The part of this land within the following boundary shewn on the plan with a blue dotted line, is claimed by Victoria. Commencing at the point marked C on the plan, the boundary line runs S. 60° 51′ W. 217 feet, thence in a bent line S. 58° 33′ W.

107 feet, thence S. 42° 42′ W. 203 feet to a stone wall—thence N. 67° 25′ W. 857 feet, to a stone wall, thence N. 62° 34′ W. 264 feet, thence N. 60 W. 386 feet to middle of the Kapakahi stream opposite the end of the stone wall at the mouth of the valley, mentioned in foregoing description—thence down the stream 1113 feet in a straight line & thence, as before described, to the point marked B. on plan, & thence to the point of commencement of detached piece No. 2, thence along the west side of No. 2 to point of commencement at C and contains an area of 217 2/10 acres.

Containing 1391 acres, more or less; excepting and reserving to the Hawaiian government all mineral or metal-ic mines of every description.

To have and to old the above granted land in fee simple, unto the said A. Paki heirs and assigns forever, subject to the taxes to be from time to time imposed by the legislative council, equally upon all landed property held in fee simple.

In witness whereof, I have hereunto set my hand and caused the great seal of the Hawaiian islands to be affixed, this eighth day of April, 1857.

[SEAL.] KAMEHAMEHA.

KAAHUMANU.

45 From 332. 10613 A. Paki. Apana 3.

Ua koi mai oia no kona aina o Waialae-iki he Ili no Waikiki, Kona, ma ka Mokupuni o Oahu, no ka mea ua loaa iaia keia aina no ka Moi Kamehameha III i ka wa o ka mahele aina ana i ka M. H. 1848, a ua noho oluolu a hiki ikeia manawa, aole mea keakea.

Oio ka makou e hooko nei no A. Paki he kuleana hoi kona malalo iho o ke ano Alodio. Ina uku mai i ke ke Aupuni hapa, alaila kupono iaia ka Palapala Siła Nui Ano Alodio.

Pono nae iaia ke uku no ka hookolokolo a me ka hooholo ana i ka olelo Penei:—

No ka rumi a me ke pai ana i ka olelo ma ka Nupepa ....
No ke kope ana i na olelo koina.....
No ka palapala kii.....
No ke kope ana i na olelo hoike.....
No ka hana ana.....
No ke ana ana i ka aina.....
No ke kope ana .....
No ka hooholo ana i ka olelo ma ka la 19 o Maraki 1853..... $10

G. M. ROBERTSON.
J. H. SMITH.
J. KEKAULAHAO.

Penei na palena. Anaia e Wm. Webster.

Description of the Boundary of the Land of Waialae-iki in Oahu, the Property of A. Paki, Esquire.

Commencing at the south east angle of the property on the sea shore at a yellow colored stone at the end of the wall of Wailupe fish pond, the boundary runs along the land of Wailupe N. 10° 34 W. 1709 feet to the top of a ridge, thence N. 12° W. 4180 feet, thence in a bent line as shown on plan, along ridge to a point N. 36° W. 715 feet, thence N. 7° 56′ E. 353 feet, thence N. 25° 40′ W. 1180 feet to the top of hill, thence along ridge N. 18° 30′ W. 693 feet, thence in a bent line alond ridge N. 1° 16′ E. 853 feet, thence in a bent line along ridge N. 34° 40′ W. 466 feet, thence N. 2° 10′ E. 306 feet, thence N. 32° 25′ W. 615 feet to summit of ridge, thence up along ridge in a northerly direction to the summit of high ridge the boundary of Koolau & along high ridge in a north westerly direction to the head of the stream named "Kapakahi," thence down along Kapakahi bounded by the land of Waialae-nui to a point 1113 feet in a straight line below the end of the stone wall on the stream at the mouth of the valley * & 57 feet above the fork of the stream in the flat, thence S. 74° 40′ W. 108 feet, thence N. 87° 50′ W. 1541 feet, thence N. 53° 6′ W. 1887 feet, thence N. 74° 30′ W. 2423 feet, thence S. 52° 24′ W. 847 feet, thence N. 63° 45′ W. 375 feet, thence along the land of Palolo & Kapahulu S. 14° 22′ west 1820 feet, thence in a bent line along foot path bounded by Waialae-Nui N. 81 E. 585 feet, thence in a bent line along foot path N. 70° 13′ E.* 595 feet, thence in a bent line along old track S. 78° 33′ E. 1610 feet, thence along old track N. 86° 34′ E. 652 feet, thence along old track N. 74° 57′ E. 619 feet, thence in a bent line along foot path S. 89° 40′ E. 2984 feet to middle of Kapakahi stream 155 feet below the point where the other boundary left the stream, thence down along the stream 748° feet, thence N. 41° 27′ E. 376 feet, thence S. 52° 10′ E. 268 feet, thence S. 46° W. 663 feet to middle of stream, thence down along stream 670 feet, thence N. 52° 35′ E. 260 feet thence N. 38° 12′ E. 670 feet, thence N. 45° 48′ W. 179 feet, thence S. 46° 63′ W. 127 feet to old wall, thence along wall N. 56° 23′ W. 277 feet to stone wall, thence in a bent line along wall, N. 33° E. 586 feet to point marked B. on plan thence in a bent line S. 76° 40′ E. 168 feet thence N. 27° 28′ E. 69 feet, thence in a bent line S. 67° 20′ E. 180 feet to point marked A. on plan, thence S. 79° 48′ E. 233 feet, thence in a bent line S. 19° 32′ W. 149 feet, thence S. 55° 51′ E. 152 feet, to a stream thence in a bent line along stream S. 43° W. 458 feet, thence S. 53° 38′ W. 152 feet, thence in a bent line S. 6° 18′ W. 285 feet, thence 83° 30′ E. 31 feet, thence S. 16° E. 174 feet to last * east side of stream, thence along side of stream S. 16° 15′ W. 287 feet, thence S.

* "Valley" not in original survey.

*"70–13 E. dubious;" "apparently 71–13."

* Original east.

47 30° 30′ W. 238 feet, thence S. 33° 20′ E. 630 feet to the mouth of the stream Kapakahi at the sea side, thence along sea side in an easterly direction to point of commencement.

Also a detached piece of Kalo land, commencing at a point S. 4° 5′ W. 123 feet from the point marked A. the boundary runs:— S. 35° 45′ W. 155 feet, thence N. 55° 9′ W. 76 feet, thence in a bent line N. 23° 25′ E. 166 feet, thence in a bent line S. 50° 30′ E. 112 feet to commencement. Area 37 / 100 acre.

The first description includes two pieces of land belonging to Waialae-Nui No. 1 & 2 on plan.

No. 1. Commencing at a point N. 21° 14′ W. 46 feet from the point marked A. the boundary runs in a bent line N. 13° 41′ E. 74 feet, thence S. 81° E. 261 feet, thence S. 10° 26′ W. 74 feet, thence N. 80° 35′ W. 266 feet to commencement. Area 43 / 100 acre.

No. 2. Commencing at a point on the stone wall N. 17° E. 266 feet from the point marked B. on plan, the boundary runs in a bent line S. 71° E. 186 feet, thence in a bent line N. 27° 36′ E. 265 feet, thence N. 41° 15′ E. 35 feet to the last * side of a stream, thence along side of stream S. 37° 50′ E. 135 feet, thence N. 89° 15′ E. 126 feet, thence No. 26° 38′ W. 118 feet, thence in a bent line N. 54° 34′ E. 373 feet to the side of a stone wall, thence N. 49° W. 326 feet, thence N. 73° 22′ W. 236 feet to a point marked C. on plan, thence S. 53° 25′ W. 193 feet, thence N. 71° 40′ W. 37 feet, thence in a bent line along side of pond to a point on a stone wall S. 35° 10′ W. 315 feet, thence S. 29° 32′ E. 48 feet, thence S. 44° 40′ W. 287 feet, thence S. 69° 48′ E. 249 feet to commencement. Area 8–88 / 100 acres.

*Original east. east

1608.20
217.20

1391.

Total area of Waialae-iki 1608–2 / 10 acres.

The part of this land within the following boundary shewn on the plan with a blue dotted line is claimed by Victoria.

Commencing at the point marked C. on the plan the boundary runs S. 60° 51′ W. 217 feet, thence in a bent line S. 58° 33′ W. 107 feet, thence S. 42° 42′ W. 203 feet to a stone wall, thence N.
48 67° 25′ W. 857 feet to a stone wall, thence N. 62° 34′ W. 264 feet, thence N. 60° W. 386 feet to the middle of the Kapakahi stream opposite the end of the stone wall at the mouth of the valley mentioned in foregoing description, thence down the stream 1113 feet in a straight line & thence as before described to the point marked B. on plan & thence to the point of commencement of detached piece No. 2, thence along the west side of No. 2 to point of commencement at C. & contains an area of 217–2 / 10 acres.

7 June 1851.

W. WEBSTER.

Olelo hoakaka.

"O ke kii o ka aina o Waialaeiki o A. Paki i kakauia e Wm. Webster aole i hookomoia iloko nei no ka nui loa, aka ; o ka moolelo wale no.

J. KEKAULAHAO.
LUNA KAKAUOLELO 2."

I hereby certify the foregoing to be a true and correct copy of land commission award No. 10613 to A. Paki, as of record in Book 10 on page 624 of land commission awards, on file in the office of the commissioner of public lands.

STEPHEN MAHAULU, [SEAL.]
Sub-agent of Public Lands, Fifth Land District.

Public lands office, July 18th, 1902.

49 From 332. 10613 A. Paki. Apana (Lot) 3.

He made claim for his land of Waialae iki being an Ili of Waikiki, Kona, on the island of Oahu, because he came into possession of this land from King Kamehameha III at the time of the division of land in the A. D. 1848, and has peaceably held it to the present time without interruption.

Thus we award to A. Paki that he has title less than al-odial. In case he should pay the government's share, then he is entitled to a royal patent in fee simple.

It is proper that he pay for the hearing and the awarding as follows:

For room rent and publishing the award in the newspaper.....
For recording investigations of claim.....
For citations.....
For recording evidence .....
For services rendered.....
For surveying the land .....
For recording .....
For the award made on the 19 of March 1853 ..... $10.

G. M. ROBERTSON.
J. H. SMITH.
J. KEKAULAHAO.

The boundaries are as follows: Surveyed by Wm. Webster.

The map of the land of Waialae-iki of A. Paki as mapped by Wm. Webster is not entered here on account of the great size, but the proceedings only.

J. KEKAULAHAO,
Official Clerk 2."

50 Certificate.

TERRITORY OF HAWAII, } ss:
Honolulu, Oahu, }

I hereby certify that the foregoing is a full true and correct translation from a transcript in a cause entitled Joseph O. Carter, *et al.* trustees — Bernice Pauahi Bishop deceased *versus* The Territory of Hawaii, more particularly on pages 45 and 48 of said transcript.

CHAS. L. HOPKINS,
Official Hawaiian Interpreter, First Circuit Court,
Territory of Hawaii.

We hereby admit that the foregoing is a full, true and correct translation of the Hawaiian passages on pages 45 and 48 of the transcript in the cause entitled Joseph O. Carter *et al.* trustees under the will of Bernice Pauahi Bishop, deceased, *versus* The Territory of Hawaii.

SIDNEY M. BALLOU,
BENJ. L. MARX,
Attorneys for Joseph O. Carter *et al.*, Trustees under the Will of Bernice Pauahi Bishop, Deceased.

LORRIN ANDREWS,
Attorney General of the Territory of Hawaii.

51 [Endorsed:] Number 5262, law division. Supreme court. J. O. Carter *et al.*, trustees under will of Bernice Pauahi Bishop, deceased, *v.* The Territory of Hawaii. Certified transcript of record.

Endorsed on cover: File No. 19,573. Territory of Hawaii supreme court. Term No. 144. Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon, and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, plaintiffs in error, *vs.* The Territory of Hawaii. Filed December 27",1904. File No. 19,573.

FILE COPY.

FILED
DEC 12 1905
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 144.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, AND ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE P. BISHOP, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

SIDNEY M. BALLOU,
BENJ. L. MARX,
Attorneys for Plaintiffs in Error.

J. J. DARLINGTON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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vs.

THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF FACTS.

This is one of the cases brought under sections 95 and 96 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved the 30th day of April, A. D. 1900, the action being to establish the plaintiffs' right in a fishery. The case was tried in the territorial court, together with the case of Samuel M. Damon *vs.* Territory of Hawaii, and but one opinion was rendered by the supreme court of the Territory of Hawaii, being entitled in both cases (14 Haw., 465). Damon prosecuted a writ of error to this court, and the judgment of the lower court was

reversed (Damon *vs.* Hawaii, 194 U. S., 154). The present plaintiffs in error now seek a similar reversal, as otherwise the decision of the supreme court of the Territory would be *res judicata* against their right to the fishery.

The only point in difference between the two cases is that in the Damon case the fishery was mentioned in the patent, whereas in the present case there is no such mention, the present plaintiffs in error relying upon the Hawaiian statutes. We claim, however, first, that the Damon case has squarely decided that the Hawaiian statutes created vested rights independent of the mention of the fishery in the patent, and, second, that if this court should hold that the Damon case did not so decide, the court must reach the same conclusion upon the principles stated and authorities cited in that case.

DETAILED STATEMENT OF THE CASE.

Section 95 of the organic act provides as follows:

"SECTION 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons, are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial enclosure, shall be free to all citizens of the United States, subject, however, to vested rights; that no such vested right shall be valid after three years from the taking effect of this act unless established as hereinafter provided."

Section 96 provides the procedure in accordance with which the present suit was brought.

Section 2 of article 5, chapter 6, of the act of 1846 provides:

"The fishing grounds from the reefs, and where there happen to be no reefs from the distance of one geographical mile seaward to the beach at low-water mark, shall in like manner be considered private property of the konohikis (landlords)

whose lands by ancient regulation belong to the same; in the possession of which private fisheries the said konohikis shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth."

This law has been on the statute books from that day to this, appearing in the Revised Laws of Hawaii of 1905 as section 475. The only question before the court is whether the rights of the plaintiffs in error to their fishery under this statute are vested rights. This case was first tried in the circuit court of the Territory of Hawaii. The title of the plaintiffs to the lands of Waialae-iki was admitted (Transcript, p. 16).

The presiding judge ruled that no vested rights in sea fisheries could be acquired by virtue of any statute of Hawaii concerning fisheries; that, therefore, plaintiffs' rights were terminated by the organic act, and ordered judgment entered for the defendant. The case was taken upon exceptions to the supreme court of the Territory of Hawaii, where, in the opinion already referred to (Carter *vs.* Territory of Hawaii, 14 Haw., 465), the court took the broad ground, as stated in the syllabus by the court, that the Hawaiian statutes giving konohikis or landlords special privileges in the sea fisheries adjoining their land were not grants of property or covenants in the nature of grants, but were public statutes, in which no one could acquire a vested right. The exceptions were overruled, and the present writ brings this question before this court.

II.

THE DAMON CASE IS CONCLUSIVE.

We submit that the case of Damon *vs.* Hawaii, 194 U. S., 154, is conclusive in favor of the plaintiffs in error. That was an appeal from the same opinion of the supreme court of the Territory. The decision of this court is conclusive

that the statutes of Hawaii created and confirmed rights, which were vested rights. It does not proceed merely upon the fact that the fishery was mentioned in the patent, but decides the broader question. The language of the court is unmistakable:

"The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. The argument against their effect * * * is one of those general truths which become untrue by being inaccurately expressed. A general law may grant titles as well as a special law. * * * If the Hawaii statutes did not import a grant, it is hard to see their meaning."

Damon *vs.* Hawaii, 194 U. S., 159.

Nor can this be said to be *obiter dictum*. The case coming from a Territory which had then the judicial status of a State, the proper question before the court was, not whether one individual, Damon, had a vested right in his fishery, but whether the Federal question decided below had been rightly or wrongly decided. Following its usual custom as outlined in Murdock *vs.* Memphis, 20 Wall., 590, the court proceeded to consider the Federal question—that is, the effect of section 95 of the organic act upon the existing statutes of Hawaii. Having reached the conclusion in the language quoted above, that this question had been erroneously decided, it further proceeded to consider whether there was anything else in the record on which a judgment could be affirmed—that is to say, whether this particular plaintiff had failed to make out a case. It was in this connection that the court decided that the mention in Damon's patent of the fishery was sufficient; but that portion of the decision dealing with the subject of vested rights under Hawaiian statutes was an integral part of the decision.

We might add that this has been the general understanding in Hawaii. The laws were revised in 1905 by a commission of three, two of whom are now judges of the supreme court of Hawaii. In note to section 95 of the organic act, this commission says:

"Fishing rights covered by land commission awards or held under laws of Hawaii (post, chap. 38) are vested rights under this section. Damon *vs.* Hawaii, 194 U. S., 154, reversing Carter *vs.* Territory, 14 Haw., 465."

And in a note to chapter 38 the commission says:

"The rights under sections 471 to 482 are vested. Damon *vs.* Hawaii, 194 U. S., 154, reversing 14 Haw., 465."

III.

The code of laws accompanying the constitution of 1839 in terms recognized and confirmed a vested right in and to the fishery in controversy.

An examination of the "principles adopted by the board of commissioners to quiet land titles, in their adjudication of claims presented to them" (Laws of the Hawaiian Islands, vol. II, p. 81 *et seq.*), which principles were enacted into law (*id.*, p. 94), discloses the fact that, prior to 1840, lands were held by tenures somewhat similar to the English feudal system, no tenant holding an allodial title. As declared in the opinion of the learned court below (Record, p. 22), the King was the universal lord and original proprietor of all the lands in his kingdom, and the source of title, with power to grant fisheries if he desired to do so.

In 1840, however, the King, in conjunction with the chiefs and nobles, promulgated a declaration of rights, constitution, and code of laws, known as the Constitution of 1839, providing, among other things, that protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they

conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws." Chapter 3, section 8, of the Code of Laws provided:

"His Majesty, the King, hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion of them to the common people, and another portion to the landlords, and a portion he reserves to himself. These are the fishing grounds which His Majesty, the King, takes and gives to the people: The fishing grounds without the coral reef, viz: the Kilohee grounds, the Lohee ground, the Malolo ground, together with the ocean beyond. But the fishing ground from the coral reefs to the sea beach, are for the landlords, and for the tenants of their several lands, but not for others."

The Code thereupon further provides:

"If there be a variety of fish on the ground where the landlord taboos his particular fish, then the tenants of his own land may take them, but not the tenants of other lands, lest they take also the fish tabooed by the landlord. The people shall give to the landlord one-third of the fish thus taken."

In the case at bar, the landlord's fish was the mullet, and the right of taking other fish was confined to the tenants of the landlord's land, who gave him one-third of the fish taken, the tenants of other lands not being allowed to take fish at all within the territory covered by the fishery right.

In considering the effect of these statutes by which the King took the fishing grounds from those who now possess them, and in lieu thereof gave to the landlords the rights above specified, the court below says:

"It is argued that these statutes are in the nature of grants, and are sufficient to vest title to the fisheries in the landlords, and that the word 'give,' used in the act of 1839, is a word of conveyance, and was sufficient to pass title to the fisheries from the King to the konohiki (landlord), and that the title so conveyed became a vested right within the

meaning and intent of sec. 95 of the organic act. We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes themselves bear conclusive evidence that they were not intended as grants of property, and that they were not intended to be more than appears from their plain terms, to wit, grants of special privileges to persons who then were or might become landlords."

We submit that the court below is reversed upon this point in the case of Damon *vs.* Hawaii, 194 U. S., 154, wherein the decision reads as follows:

"The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. The argument against their effect was not that in this case the ahupuaa did not belong to the fishery, within the words 'landlords whose lands, by ancient regulation, belong to the same,' (the land seems formerly to have been incident to the fishery,) but that citizens have no vested rights against the repeal of general laws. This is one of those general truths which become untrue by being inaccurately expressed. A general law may grant titles as well as a special law. It depends on the import and direction of the law. A strong example of the application of the rule intended by the argument is to be found in Wisconsin & Michigan Railway *v.* Powers, 191 U. S 379, where a railroad company was held to have no vested right to exemptions proclaimed in a general tax act. The statute was construed not to import an offer, covenant or grant to railroads which might be built in reliance upon it. But if a general law does express such an offer, as it may, the grant is made. If the Hawaii statutes did not import a grant it is hard to see their meaning."

It will be observed that the court below bases its rejection of the plaintiff's claim upon three grounds, namely:

(*a.*) Absence of definite description of the alleged subject of the grant;

(*b.*) Absence of proper words of grant, and

(*c.*) Absence of a definite grantee.

We respectfully submit that, particularly in such a case as the present, with its peculiar attending circumstances, the doctrines expressed by this court in Miles *et al. vs.* St. Clair County *et al.*, 8 How., 569, 581, is specially applicable:

"If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted."

The learned court's rejection of the plaintiff's claim, upon the grounds assigned by it, fails to take into account the fact that these are grants by the Government, which can be made in any language the granting power may see fit to employ, and that the rules of the common law as to conveyances between private parties are not applicable. The sovereign being supreme, its power to make grants in any terms which will give expression to its purpose is likewise supreme and unlimited, public and private grants differing very materially in these respects.

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." (Railway Co. *vs.* Railway Co., 97 U. S., 491, 497.)

"The fault of this reasoning is that it seeks to apply the principles which relate to common-law grants between private persons to an act of the legislature, which differs from a grant of a private person in that it is both a grant and a law: and, as such, the intent of the law is to be kept in view, and its purpose effectuated, whenever the subject-matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the legislature, however such construction may conflict with the principles of the common law, or prevent the attachment of equities which would spring from transactions between private parties. (Citations.)" (Railroad Co. *vs.* Davidson, 65 Mich., 416, 430.)

"The solution of these questions depends, of course, upon the construction given to the acts making the grants, and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." (Winona & St. Peter Railroad Co. *vs.* Barney, 113 U. S., 618, 625; United States *vs.* Railway, 150 U. S., 1, 14; Barden *vs.* N. P. R. R., 154 U. S., 288, 326; Wisconsin Central R. R. Co. *vs.* Forsythe, 159 U. S., 46, 55; Sioux City R. R. *vs.* U. S., 159 U. S., 349, 360; United States *vs.* Oregon, &c., R. R., 164 U. S., 526, 539; Shaw *vs.* Kellogg, 170 U. S., 312, 331; Oates *vs.* National Bank, 100 U. S., 239, 244; State *vs.* Smith, 40 Ark., 341; Smith *vs.* Pipe, 3 Colo., 187, 196–197.)

In Nash *vs.* Sullivan, 29 Minn., 206, 214, land had been granted to a railroad company under a State act passed prior to the act of Congress upon which the State's title depended, and it was urged, in opposition to the grant to the railroad, that grants made by legislatures are not warranties, and that therefore if the thing granted was not in the grantor at the time of the grant, no estate passed to the grantee, citing Rice *vs.* Railroad Co., 1 Black, 358, as authority for the proposition contended for. But the court said:

"If an act of the legislature be considered merely as a grant, this doctrine would, undoubtedly, be sound. But it is always to be borne in mind, in construing a legislative grant, that the act by which it is made is a law as well as a

conveyance, and that such effect must be given to it as will carry out the intent of the legislature. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties."

Where a legislative grant is of a certain number of square leagues, to be located within a certain district, which grant would have been void in a conveyance by private persons for indefiniteness and uncertainty, the grant is good, and the delivery of possession within the district renders the title complete and defines the location of the grant (Pinkerton *vs.* Ledoux, 129 U. S., 346, 354; Foss *vs.* Hinkell, 91 Cal., 194, 199). *A fortiori*, in a case like the present, where, although no exact description be given, the provision that "from the coral reefs to the sea beach are for the landlords and for the tenants of their several lands, but not for others," is of a character so definite that the subject of the grant is clearly defined, we respectfully submit that not only does the title vest at the date of the act, but it likewise attaches to the property thus ascertained or described at the same time, no further act being necessary to identify it.

In United States *vs.* The Southern Pacific Railroad, 146 U. S., 570, 594, the opinion quotes from St. Paul and Pacific R. R. Co. *vs.* Northern Pacific Railroad Co., 139 U. S., 1, 5, as follows:

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved."

And this court added:

"In view of this late and clear declaration, it would be a waste of time to attempt a re-examination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and

made it so that the old common-law rule as to the necessity of identification to the conveyance has not been controlling in determining the scope and effect of a congressional land grant."

See also Schulenberg *vs.* Harriman, 21 Wall., 44, 62.

In the second place, with respect to the use of words of grant, we respectfully submit that the word "give" in the act of 1839 is equivalent to the word "grant."

In Rice *vs.* Railroad Co., 1 Black, 358, 378, where an act of Congress granting certain lands to the then Territory of Minnesota was before the court, this court said:

"But the word 'grant' is not a technical word like the word 'enfeoff.'"

In Pierson *vs.* Armstrong, 1 Iowa, 282, 393, the court say:

"The words *dedi* and *concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, etc."

"The word *dedi* operates as any kind of conveyance."
Denn *vs.* Gifford, 1 N. J. L., 197, 198.

In Shove *et al. vs.* Pincke, 5 T. R., 124, 129, Lord Chief Justice Kenyon said:

"It has never been held necessary that the word 'grant' should be used in a grant, it being sufficient if the intention to grant be manifest by the deed."

And Buller, J., said:

"The thing conveyed is a reversion; that is the subject of a grant; and the words 'limit and appoint' operate as a grant."

And the case before the court was not a grant by the sovereign, but merely between private parties. And see Kent, C. J., in Frost *vs.* Raymond, 2 Caine, 188, 194.

Where Congress "relinquished" to the State of Iowa all

the title which it retained in certain described lands, this court held in United States *vs.* Des Moines Navigation and Railway Co., 142 U. S., 510, 515, 529, that the resolution, though in terms merely a relinquishment, "also operated as an immediate transfer of title."

Finally and conclusively upon this point is respectfully submitted the case of Rutherford *vs.* Greene's Heirs, 2 Wheat., 196, 205, in which case this court, by Marshall, C. J., construing an act of the legislature of North Carolina passed in 1782, said:

"The 10th section enacts, 'that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this State entertains of the extraordinary services of that brave and gallant officer.' This is the foundation of the title of the appellees. On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the State, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers. * * * It has been said that, to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read 'shall be allotted for, and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms used in a conveyance. * * * It is clearly and unanimously the opinion of this court that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title, and attached it to the land surveyed."

The objection of the learned court below that the provisions of the act in question were insufficient to vest title because of the supposed absence of a definite grantee is, it is submitted, equally untenable.

In City of Boston *vs.* Lecraw, 17 How., 426, 432–3, this court said:

"By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extended to high-water mark only. But by an ancient ordinance, usually denominated the ordinance of 1641, sec. 3, it declared, 'that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further; provided that such proprietors shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands.' This is the foundation of what may be called the common law of Massachusetts on this subject. By it, the grantee of land bounding on navigable water where the tide ebbs and flows, acquires the legal right and a vested interest in the soil of the shore between high and low water mark, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the grantor."

See also Austin *vs.* Carter, 1 Mass. Rep., 231.

The supreme court of Massachusetts, in Commonwealth *vs.* Alger, 7 Cush., 53, 72, passing upon the effect of this same ordinance, says:

"We think it is, therefore, impossible, from this casual use of the word 'liberty' in the proviso, to infer that it was intended to give a gratuitous permission or license to the riparian proprietor to make a temporary or casual use of the flats adjoining his upland; and we think it was intended to declare a general rule of property, in regard to all real estate, bounded upon tide waters, annexing a new and additional right of soil in the shore, subject to the restrictions above mentioned."

These cases, we submit, apply with force to the present case, not only as to the meaning of the words of conveyance used, but also as to the question of definiteness of description both of the grantee and of the subject of the grant. In every essential respect, we submit, these cases are entirely analogous to the one at bar, and, if correctly decided, must control it.

The provision before the court, embodied in the Code of Laws accompanying the Constitution of 1839, is, beyond doubt, the foundation of what, in the language of this court in Boston *vs.* Lecraw, *supra*, may be called the common law of Hawaii upon this subject. By it the owner of lands adjoining the sea "acquires the legal right and a vested interest in the fishing grounds from the coral reef to the sea beach, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the Government." That provision was, undoubtedly, "intended to declare a general rule of property." The fact that the act which conferred these rights was the same act that, to use its own language, "takes the fishing grounds from those who now possess them," in connection with the further fact that the accompanying declaration of rights provided for protection to the persons and property of all the people, leads indubitably to the conclusion that some substantial right, and not a mere revocable license, was intended to be conferred And this was unquestionably the intent and understanding of Congress in section 95 of the organic act; for otherwise the saving of vested rights and the provision for establishing them contained in that section would be meaningless and inoperative.

IV.

Section II, chapter VI, article V, of the Hawaiian act of 1846 provides in terms that such fishing ground shall be considered the private property of the landlords.

But, in the second place, even if there were room for doubt as to whether the intention of the legislature as expressed in the Code of Laws of 1839 gave and confirmed a vested right in and to the fishery in question, the subsequent enactments of the legislature, we submit, have removed them.

Section II of article V, chapter VI, of the Act of 1846, sometimes referred to as the act of 1845, provides:

"The fishing grounds from the reefs, and, where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landholders shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth."

A comparison of this enactment with the Massachusetts ordinance considered by this court in Boston *vs.* Lecraw, *supra*, will show how similar they are, the Hawaiian act, however, being stronger, in that it in express terms declares that the fishing grounds in question "shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same."

Section III provides:

"The landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of the landlords, subject to the restrictions in this article imposed." (Laws of the Hawaiian Islands, vol. I, pp. 90, 91).

The ensuing provisions conferred upon the landlords the right to set apart for themselves one species or variety of fish natural to the fishery, and provided for public notice by proclamation of the species so reserved, etc., or upon consultation with their tenants, "in lieu of setting apart some peculiar fish to their exclusive use, as hereinbefore allowed, to prohibit during certain indicated months of the year all

fishing of every description upon their fisheries; and, during the fishing season, to exact of each fisherman among their tenants one-third part of all the fish taken upon their private fishing grounds."

It must be conceded that no rights are claimed by the plaintiffs in error in this case which are not identical with those conferred by the act of 1846.

The learned court below was of the opinion that the provision of the law declaring that the fishery "shall in law be considered the private property of the landlords" was without significance, that court declaring:

"The phrase 'private property' used in the law cannot mean more than the rights which the statute gave to the konohiki or landlord over the fishery, and such private property could not be said to be held by contract, or any covenant in the nature of a contract."

This conclusion of the learned court is exactly the reverse of that reached by this court in the case of Damon *vs.* Hawaii, where the court says:

"The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and, if they imported a grant or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant."

In addition, not only does the law in question declare that the fishing grounds "shall in law be considered the private property of the landlords," etc., but that said landholders "shall not be molested" in the possession of their said "private fisheries;" and again, "the tenants shall be at liberty to use the fisheries of their landlords, subject to the restrictions in this article imposed."

It is respectfully submitted that, even if this were a question of novel impression, unilluminated by any judicial con-

struction by the Hawaiian courts, the act which declares the fishery rights to be, in law, the private property of the landlords, and which describes each of them as a "private fishery," and a "fishery of the landlord," unquestionably must be held to give to the landlord a vested property right.

The question, however, is further removed from the field of controversy by the construction placed upon the law by the supreme court of Hawaii in the case of Haalelea *vs.* Montgomery, 2 Haw., 62, 66, 70, 71, in the year 1858, a dozen years after the act was passed and nearly a half century before Congress passed the organic act, under which the present proceedings originated. In that case the court, after quoting sections 2 and 3 of the act of 1846 above set forth, said:

"Under this statute, as we understand it, the entire fishing ground, lying between low-water mark and the outer edge of the coral reef, (or Kuanalu, as it is called in the Hawaiian version), along the seaward front of the Ahupuaa of 'Honouliuli,' was the private property of M. Kekauonohi, possessed and held by her as such, subject to the piscatorial rights of the tenants living on that Ahupuaa. * * * None of the rights of piscary possessed by M. Kekauonohi, as owner of the fishery, could have passed as a mere appurtenance to the piece of land conveyed to Isaac Montgomery. She could have transferred the fishery, or her right therein, only by express grant, *eo nomine*. Had she made a deed even of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee. * * * If any person who has acquired a kuleana on the Ahupuaa of 'Honouliuli' should sell and convey his land, or even a part of it, to another, a common right of piscary would pass to the grantee, as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance—it would pass as an incident. (See Kent's Com., vol. 4, p. 517; Comyn's Digest, vol. 4, title Grant, E. 11.) Here, we think, is the great distinction between the rights of the konohiki, and those of the tenant or occupant; for, while the former holds the fishery as his private property, the latter has only a right of piscary therein, as an in-

cident to his tenancy. This marked distinction in their respective rights must create a corresponding difference in regard to the transfer of those rights."

Thus, practically contemporaneously with the passage of the organic act, this final and unmodified adjudication by the highest court of Hawaii upon the character of the landlord's rights in the fisheries, under the statute, holds unmistakably that he has a right of property—a vested right, of too important and positive a character to be transferable as "a mere appurtenance," while the rights of the tenants, being of an inferior character, would pass as an appurtenance, without express mention in the conveyance.

It is respectfully submitted that this decision, by the highest judicial tribunal of a foreign nation, upon a question undoubtedly purely local, is conclusive upon all the world; and that it must be presumed that Congress understood the effect and meaning thereof when sections 95 and 96 of the organic act were enacted by it (C. & P. Tel. Co. *vs.* Manning *et al.*, 186 U S., 238, 245).

"The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that, when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it."

Louisiana *vs.* Pillsbury, 105 U. S., 278, 294.
Morley *vs.* Lake Shore Railway, 146 U. S., 162, 166.
See, also, May *vs.* Tenney, 148 U. S., 60, 64.

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself." (Louisiana *vs.* Pillsbury, 105 U. S., p. 295, and citations.)

The exposition of the act of 1846 given by the supreme court of Hawaii in Haalelea *vs.* Montgomery, *supra*, having become a rule of property, under which the fishery right in controversy here was acquired, and was transmitted through the various channels shown by the record, until it vested in the present plaintiffs in error, it is respectfully submitted, becomes equally entitled to exemption from impairment by subsequent decisions as in the case of contracts referred to in the above citation.

In Elmendorf *vs.* Taylor, 10 Wheat., 153, 159, this court, speaking by Marshall, C. J., said:

"This court has uniformly professed its disposition in cases depending upon the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute.

"It is an elementary principle that this court, in interpreting a State statute, will construe and apply it as settled by the court of last resort of the State, and will hence only form an independent judgment as to the meaning of the State law when there is no binding construction of such State statute by the court of last resort of the State." (Railroad Company *vs.* Trust Co., 173 U. S., 99, 107. See, also, Greene *vs.* Lessee of Neal, 6 Pet., 291, 297.)

Should not, then, the decision of the supreme court of Hawaii, rendered almost contemporaneously with the act in question, and in force at the time of the passing of the organic act, be presumed to have been known to Congress, and to have entered into its contemplation and purpose in its enactment of that act, be followed upon this question?

Of this case of Haalelea *vs.* Montgomery, the brief on behalf of the defendant in error in the court below said:

"The result of that case has stood as the undisputed law of these islands for nearly half a century, and, we submit, cannot now be shaken."

In construing statutes such as those now under consideration, namely, enactments made by and under a form of government essentially distinct and fundamentally different from our own, and which have stood undisputed for more than half a century, is it not right to lean toward a construction that will deal justly with those who have acquired property rights under them, always bearing in mind that we are not at liberty to consider them in the view of our own public policy, opposed as it is to exclusive rights of any kind, but that we are under the duty of placing ourselves as nearly as may be in the identical position occupied by the Government making the grant at the date thereof, and considering its laws and its policies at that time?

In Mobile, etc., R. R. *vs.* Tennessee, 153 U.S. 486, 502, this court declares:

"Legislative contracts, especially, should be read in the light of the policy entertained, and the purposes sought to be accomplished, at the time they were made, rather than at a later period, when different ideas and theories may prevail. In Platt *vs.* Union Pacific Railroad (99 U. S., 48, 64), Mr. Justice Strong expresses this proposition as follows: 'There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * *

But, in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; looking at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.'"

In Martin *vs.* Waddell, 16 Pet., 367, 411, reviewing the grant of New Jersey by Charles II to the Duke of York, the court said:

"We must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight."

And we have here suggested another pertinent and very important rule of construction, namely, that great weight is to be given to contemporaneous construction.

"If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the Land Department for eighteen years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight."
United States *vs.* Union Pacific Railway, 148 U. S., 562, 572.

Here, we have the construction of the court of last resort of Hawaii, as final and as conclusive in that country, at the time it was rendered, as are the decisions of this court with us, and under which construction these and similar fisheries have been put upon the market and have passed to successive owners for half a century.

"As early as 1803, it was held by this court, in Stuart *vs.* Laird, 1 Cranch, 299, 309, that a practical construction of the Constitution that the justices of the Supreme Court had a right to sit as circuit judges, although not appointed as such, was not open to objection. 'It is sufficient to observe,'

says the court, 'that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of a most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

Schell's Executor *vs.* Fouche, 138 U. S., 562, 572.

After the adoption of the constitution and the passage of the act of 1846, the King, in 1851, approved an act granting to the people the rights of piscary belonging to the government, in the following language:

"All fishing grounds appertaining to any government land or otherwise belonging to the government, excepting only ponds, shall be, and are, hereby, forever, granted to the people for the free and equal use of all persons."

Session Laws Hawaii, 1851, p. 23.

Had the fishery now in controversy been held by plaintiff in error under a mere license, revocable at pleasure, and if the fishery itself in any manner belonged to the government, it indisputably follows that this act operated as a revocation of any mere license to the landlord, and granted the fishery to the people "for the free and equal use of all persons." Although half a century elapsed between this act of the King and the passage of the organic act, no such claim was ever put forth, but, on the contrary, the right of the plaintiff and those under whom he claims to the exclusive use and enjoyment of this fishery, which is equivalent to saying to the property therein, subject only to the common of piscary enjoyed by the tenants, was continuously conceded and acquiesced in by all the world.

The court below referred to an act, passed in 1851 (Session Laws Hawaii, 1851, p. 25), providing :

" No person who has bought, or who may hereafter buy, any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior."

It does not appear that the court attached any importance to this act as affecting the rights of the plaintiff in error in this case, and it is very clear that the act is not capable of such a construction, because, in the first place, the fishing grounds of the plaintiff in error and his predecessors in title were " included in his title " for the obvious reason that the decision of the court in the case of Haalelea *vs.* Montgomery, recognizing that title in the landlords, was rendered seven years after this act was passed, and of course with full knowledge of it. Section 2 of this same act of 1851, accompanying and directly following the section in question quoted by the court below, provides: " If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall only be tabooed when caught within the bounds of the konohiki's private fishery," thus clearly recognizing a vested interest in the konohiki or landlord to such private fishery.

Not only have we this long acquiescence by the State and the public in the right asserted by the plaintiffs in error, but we have also a later explicit declaration by the legislature itself in the Penal Code of 1859, which code reënacts the " private property " and other provisions of the act of 1846, and the " public granting " clauses of the act of 1851, as follows :

"SECTION 384. All fishing grounds appertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be, and are hereby forever granted to the people, for the free and equal use of all persons."

"SECTION 387. The fishing grounds from the reefs, and, where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall, in law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

"SECTION 388. The konohikis shall be considered in law to hold said private fisheries for the equal use of themselves, and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their konohikis, subject to the restrictions imposed by law.

"SECTION 389. The konohikis shall have power, each year, to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by *viva voce* proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to set apart for themselves.

"SECTION 390. The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate such reserved fish to their private use, but, when caught, such reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same."

"SECTION 392. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as hereinbefore allowed, to prohibit during certain months in the year all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds.

"SECTION 393. No person who has bought, or who may

hereafter buy, any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land.

"SECTION 394. If that species of fish which has been tabooed by any konohiki, shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall be tabooed only when caught within the bounds of the konohiki's private fishery."

These provisions were all substantially reënacted in the Revised Laws of Hawaii, 1905, chapter 38.

Consideration of the foregoing provisions seems conclusively to demonstrate that they may all stand together upon one hypothesis only, namely, that the fisheries claimed, which they declare "shall, in law, be considered the private property of the konohikis," that "the tenants shall be at liberty to use the fisheries of their konohikis, subject to the restrictions imposed by law," etc., did not "belong to the government," but were "included in the title of the konohikis or landlords," and, so construed, further discussion of the subject becomes unnecessary.

Of the cases cited by counsel for defendant in the court below but two, it is submitted, are even colorably relevant to the case at bar, namely: Pratt *vs.* Brown, 3 Wis., 603, 616, and Phipps *vs.* State, 22 Md., 380.

Of the first of them it was argued below:

"In Pratt *vs.* Brown, it was held that the right given by statute to mill owners to build dams and flood their neighbors' lands was not a vested right, but one which terminated with the repeal of the act."

But this case cannot be regarded as a precedent here. It must rest upon its own peculiar facts and upon that principle of the law of eminent domain upon which the case turned, namely, the principle which declares that title

passes only when compensation is made. The court, at page 616 *et seq.*, say:

"In all the foregoing remarks, no reference has been had to cases in which the person whose lands have been taken under the law has proceeded to have his damages assessed, and received his compensation. Whether such proceeding on his part would be construed into an assent, and assume the character of a contract which after legislation could not impair, we do not pretend to say. That question is not now before us. The consequences of the landowner accepting the gross sum, or the annual compensation assessed by the jury, are not now the subject of inquiry, for the reason that the plaintiffs in this case, nor their grantors, have ever taken any measures to have their damages assessed, nor, so far as appears in the record, done any act from which their assent to the flowing of their land can be implied. The defendant stands here upon the naked authority which he claims to have derived by operation of law. We look upon his position precisely as though the government had appropriated the land of the plaintiffs during its pleasure, and constituted the defendant the occupier during the same period. Undoubtedly he has a vested right to the occupancy of the land as long as the government should see fit to continue its appropriation, and no longer. The effect of the enacting and repealing statutes is, that the government, through the agency of the mill-owner, held the lands liable to seizure and appropriation for the period of ten years, or until the second day of January, 1850. From that time the public use ceased, and if the mill-owner desired further occupancy, he must derive his right thereto from contract with the owner, and not through the sovereign right of eminent domain."

It is accordingly apparent that the decision of the Wisconsin court turned upon the fact that the act relied upon by the defendant in that case was an act allowing him to take the property of another, namely, by overflowing it, without compensation, a question which, it is equally apparent, is in nowise presented by the case at bar.

With regard to the case of Phipps *vs.* State, 22 Md., 380, three observations are made, namely:

(1.) In the first place, the court was dealing only with section 17 of article 71 of the Code, which authorized "any citizen of any county bordering on the waters of this State" to "locate and appropriate in any of the waters thereof any area not exceeding one acre in extent for the purpose of depositing, bedding or sowing oysters or other shell fish." This section, as will be seen, does not confer any right appurtenant, incident, or in any way connected with the ownership of any land or property of any description, but gives merely a personal privilege to any one happening to be a citizen of any county which borders on the waters of the State to locate and appropriate an area in any of the waters of the State, not only not bordering upon any land owned by him, but not necessarily bordering on his county, for the purposes specified in the law.

Contrast this with the language of the Hawaiian act of 1846:

"The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall in law be considered the private property of the landlord."

(2.) But, in the second place, if the language of the law of Maryland and of the Hawaiian law were identical, yet, the Maryland act having been construed to be a license merely in this case of Phipps *vs.* State, and the Hawaiian act having been construed by the supreme court of Hawaii, in the case of Haalelea *vs.* Montgomery, to give to the landlord "the fishery as his private property," requiring the inclusion of it by metes and bounds or other specific description in order to pass title to it by deed, this court will construe the act in Maryland according to the construction of the court of appeals of that State, and the act in Hawaii according to the construction of the supreme court of that kingdom, as though they had been different acts (Louisiana *vs.*

Pillsbury, 105 U. S., 278, 294; Morley *vs.* Lake Shore Railway, 146 U. S., 162, 166; May *vs.* Tenney, 148 U. S., 60, 64).

(3.) In the third place, if the rule last cited be disregarded, and if the Hawaiian and the Maryland acts are not distinguishable in the facts and conditions to which they relate, so that this court is called upon to pass upon the relative accuracy or correctness of the two constructions, the case of Boston *vs.* Lecraw, *supra*, furnishes both precedent and authority for such decision.

Upon consideration of the foregoing principles, authorities, and facts it is respectfully submitted that the right of property claimed by the plaintiffs in error in the fishery is sustained.

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Clerk.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 144

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, AND ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE P. BISHOP, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

(Filed by leave of Court given in open Court December 13, 1905.)

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THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

Reply Brief for Plaintiffs in Error.

(Filed by leave of Court given in open Court December 13, 1905.)

The brief of defendant in error is, for the most part, a reiteration of propositions which were fully considered in the briefs filed in the Damon case (194 U. S., 154). Their treatment, however, in the brief filed here perhaps calls for explanation on the part of the plaintiff of some phases which might otherwise tend to confuse or mislead the Court.

The Territorial Court in that case, as in this, ruled directly that the Hawaiian statutes were not grants, and that no vested rights could be acquired under them, and was as directly reversed by this Court upon both points. We are content to rest this portion of the case upon the authority of the Damon case, and upon the reasoning and authorities cited in our principal brief.

With respect to the proposition now advanced that "the fishery right claimed by plaintiffs in error (if any ever existed) was lost because not presented to the Land Commissioners for award," it will be noted that this point did not enter at all into the decisions arrived at by either of the courts below, their rulings being simply that the right never existed except as a revocable license, so that the question of the loss, by failure to present to the Land Commissioners, of a right which never existed, neither did nor could arise. There is an incidental reference to the authority of the Land Commission to award fisheries, which is a necessary premise to the contention now made, at p. 28 of the record, where, in considering whether or not the fishery passed as an appurtenance to the land, and holding that it did not, the Court remarked: "This construction of the statute is further supported by the fact that the Land Commission, although given authority to award 'rights of piscary' by statute creating it (Statute Laws, Vols. I and II, Sec. 7, p. 109), refused to award fisheries either as 'rights or territory,' except in a very few instances, leaving the parties to their rights under the general statutes. *Akeni v. Wong Ka Mau*, 5 Haw. 91."

So far as that part of this statement is concerned that declares that the Land Commission refused to award fisheries, leaving the parties to their rights under the general statutes, the quotation is supported by the case cited and is correct. The learned Court, however, has inserted both an exception and a new proposition as to the authority of the Land Commission under the statute, neither of which is found in the case cited, and in doing so, we respectfully submit, fell into grave error. Not only was no authority given the Land Commission to award rights of piscary, but it refused to award fisheries, basing its refusal expressly and solely upon an absence of authority so to do.

The Land Commissioners had jurisdiction over claims to land only. They had no jurisdiction to award or refuse to award fishing rights. They held, repeatedly, that they were without jurisdiction over fishing rights. No appeals were taken from any of these decisions, but they were acquiesced in for over half a century, and are the foundation of valuable property rights.

That the Land Commissioners had no jurisdiction over fishing rights can be shown both on principle and authority. By the statute creating that Commission, land, and land only, was to be the subject of claims and awards. The statute can be found in Revised Laws of Hawaii (1905), p. 1160.

The Act is entitled, "Of the Board of Commissioners to Quiet Land Titles," and its principal provisions are as follows:

"Section I. His majesty shall appoint through the Minister of the Interior, and upon consultation with the privy council, five commissioners, one of whom shall be the attorney-general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior upon the applicant."

"Section VII. The decisions of said board shall be in accordance with the principles established by the Civil Code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights of adoption; which decisions, being of a majority in number of said board, shall be only subject to appeal to the Supreme Court, as prescribed in the act to organize the judiciary, and, when such appeal shall not have been taken, they shall be final.

"Section VIII. All claims to land against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein."

The remaining sections, which relate to the procedure of the Commission, also support the contention that the

Commission had jurisdiction over nothing but land, as for example:

"We will carefully and impartially investigate all claims to *land* submitted to us," etc.

Form of oath of commissioners Sec. 2.

"The undersigned have been appointed * * * a board of commissioners to investigate and confirm or reject all claims to *land* arising," etc. * * *

"All persons are required to file with the board specifications of their claims to *land*, and to adduce the evidence upon which they claim title to any *land* in the Hawaiian Islands," etc.

Form of advertisement Sec. 5.

It is entirely evident from the language of this act that the Board in question was created to determine the validity of claims by individuals to land, and to lands only.

Not only so, but the only reference to piscary rights contained in the act is the provision in Sec. 7, that the decision of the Board, in passing upon the disputed claims specified, should be in accordance with the principles established by the Civil Code of the kingdom, in regard to the prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, etc., etc. Not only does the title of the act indicate that the powers of the board were expressly restricted to 'quieting land titles,' but the act in its entirety shows the same restrictive legislative intent.

Compare these definite provisions with the language

of Sec. 7 relied upon by the defendant. Where is the language to warrant the conclusion that the matters enumerated in that section are to be subjects of award? If so, the Board was given "express authority" to award the rights of women, the rights of absentees, primogeniture and rights of adoption. Absurdity of construction could go no further.

The matter could be lightly dismissed were it no so important. Not only are these fisheries involved, but "water privileges," the most valuable assets in the Hawaiian Islands and the foundation of their chief industry, stand upon precisely the same footing. A decision of this Court that "water privileges and rights of piscary" were within the jurisdiction of the Land Commission, and, if not awarded, are barred, would destroy millions of dollars' worth of property at a stroke.

That the Land Commission itself decided that it was without jurisdiction to consider claims to fisheries is well known to every student of the laws of Hawaii. The decisions themselves are usually endorsed on the awards as made, and, while on record in the Land Office in Hawaii, have never been published. A decision of the Supreme Court, however, refers to and affirms the contemporaneous construction of the statute by the Board of Land Commissioners, to the effect that the Board was without jurisdiction to award fisheries. In Arkeni *v.* Wong Ka Mau, 5 Haw., 91, cited below to show that the Board had authority to award such rights, the opinion of the Boundary Commission, which the Court affirmed, on the contrary, distinctly declares:

> "I find in repeated instances that the Board declines to award and define piscary rights, leaving parties to their rights under general statutes: *e. g.*, in the award to Kiahua, Vol. 10, p. 50, where the fishing right was surveyed and included in the land asked for, the Board expressly refused to award this portion of the survey, remitting the claimant to the law, indorsing this refusal both on the notes of survey in the award and on the accompanying plat, and no instances of a contrary practice are shown to me."

The award to Kahanaumaikai of record in Vol. 10, page 58 of Awards, referred to in this decision, contains the following remarks at the foot of the Award.

> "Remarks: The sea appurtenant to this land can not be awarded for same in the same manner as real property; but Kahanaumaikai can elect (to chose) one kind of fish in that sea according to law and can set apart the same in such manner as may not conflict with the intent of the law. By order of the Land Commissioners.
>
> "September 22, 1852."

The diagram contains the following notes.

> "The survey of this Apana 6, relative to sea, has been set aside and rejected; but the right to take fish according to law still exists; but this Apana can not be awarded as a kuleana. By order of J. W. Nowlein, Clerk."

The leading case of Haalelea v. Montgomery (2 Haw. 62), is also valuable as contemporaneous construction. In that case as in this there was no mention of the fishery in the Award, and yet the Court held that the

fishery was private property under the statute, the language of the Court being:

> "Under this statute, as we understand it, the entire fishing ground, lying between low water mark and the outer edge of the coral reef * * * along the seaward front of the Ahupuaa of 'Honouliuli,' was the private property of M. Kekauonohi, possessed and held by her as such, subject to the piscatorial rights of the tenants living on that Ahupuaa."

The refusal of the Land Commission to entertain jurisdiction of claims for fisheries has stood unquestioned as the law of the Islands for over half a century, and property rights of the most important and valuable character have been acquired, dealt with, and now rest, upon the faith of this ruling.

This is not a question of the effect of the Organic Act or of the annexation of the Islands. If the contention be correct, the plaintiffs not only have no fishery to-day, but they never had one. Yet not only did these plaintiffs claim and enjoy this fishery, but scores of others have owned, bought, sold, leased and devised fisheries and water privileges, none of which were ever presented to the Land Commission. It is a settled principle of law that decisions which constitute the foundations to title are not to be lightly disturbed, and this is particularly true where they have stood undisputed for fifty years

Even if the Board of Land Commissioners erred in its decision that its jurisdiction did not extend to claims of piscary rights, and if it were competent, now, to re-open that question and reverse its decision, the omission of

claimants to present their claims before it, under the circumstances, could not bar their rights. The Board, publicly and repeatedly, announced that it would exercise no such jurisdiction, and would entertain no such claims, or pass upon them; and, under such conditions, it would have been a vain and useless thing to present them, and no rights were lost by the failure to make the offer to do so.

U. S. *v.* Lee, 106 U. S., 196, 202.

Neither law nor equity requires meaningless forms.

Case *v.* Beauregard, 101 U. S., 688, 690.

At p. 21 the opposing brief states:

> "The division of the fisheries by such general language, like the division of the lands subsequently by the 'Great Mahele,' did not confer title, but only paved the way to secure title."
>
> Kenoa *v.* Meek, 6 Haw., 671.

This reference is so often repeated in the brief to the same point, that it is rather disappointing to find, upon examination of it, that it has no bearing whatever upon the proposition in support of which is cited.

The opinion in that case contains "a brief history of the legislation on the general subject of land titles,' which states:

> "It appears by the act of the 13th day of June, 1848, that His Majesty, the King, surrendered to his chiefs and people the greater portion of his royal domain, and placed the same in the keeping of the House of Nobles and Representatives, or such

person as they may appoint, and to be disposed of in such manner as the House of Nobles and Representatives may direct.

"Certain lands were confirmed as the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors; and certain other lands were set apart as the lands of the Hawaiian Government, subject to the rights of tenants, to be disposed of by the Minister of Interior, according to the provisions of law, with the approval of His Majesty in Privy Council. *The land in controversy, was so set apart to be disposed of as aforesaid.*

"A Board of Land Commissioners was established in 1846 for the investigation and final ascertainment or rejection of all claims of private individuals, whether native or foreign, to any landed property acquired anterior to the passage of this act. The statute declared that this Board shall be in existence for two years.

"On the 13th day of June, 1848, the legislature extended the powers of the Board for such further time as might be necessary for the examination, settlement and award upon all such claims as may have been presented to the said Board."

Then follows a review of several acts extending the time within which claims could be presented and considered, including the Act of 1860, which authorized the Minister of Interior "to grant awards for their lands to all Konohikis who have failed to receive the same from the Land Commission, provided that the names of all such Konohikis appear in the Mahele Book of the year

1848; and all awards so granted by said Minister shall be equally valid with those of the Land Commission."

The action was ejectment, plaintiffs claiming title "by the Mahele of February 4, 1848, and the award issued by the Minister of the Interior in 1862, under the Act of 1860, based upon said Mahele. The defendant claims by a Royal Patent, dated January 27, 1851, to A. Bishop, and a deed from Bishop to himself of May 28, 1851. The ancestor of plaintiffs received from his majesty Kamahameha III the following evidence of title as made by the Mahele. Pahoa's—the one half of the land of the Ahupuaa Kalena Island. One half of the Kalena III of Waianae Ahupuaa, Waianee, Oahu. I consent to this division. It is good; Pahoa's is the one-half of the land mentioned above; consent is given to take it before the Land Commissioners.

"(Signed) KAMAHAMEHA. [Seal.]

"ROYAL PALACE, February 4, 1848."

Pahoa did not exercise the privilege thus given him of taking his claim before the Land Commissioners, but took it before the Minister of the Interior after Bishop had obtained his patent, and then contended that the award of the Minister of the Interior superseded that patent. The Court, in giving judgment against this contention, said:

> "The land was set apart as the land of the Government by a special enactment, subject to the rights of tenants, and, as Pahoa's right was not confirmed by the Land Commission, the entire interest remained in the Government. The Mahele

itself did not give a title. It is a division, and of great value because *if confirmed by the Board of Land Commission, a complete title is obtained.* But it was open to examination, and, if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission, their *award gave a complete title.* By the Mahele, his Majesty the King consented that Paha should have the land, subject to the award of the Land Commission. It appears by the whole course of legislation that an award by the Board of Land Commission was necessary to perfect the title until, by the law of 1860, the Minister of the Interior was authorized to grant awards."

It will thus be seen that the statement of the opposing brief that this case sustains the proposition that the division of fisheries did not confer title is wholly incorrect, and has no application to a case such as the present.

There is no analogy whatever between the "Mahele" or division of land between the King and the landlords, and the statute of 1839 respecting fisheries. The first was in the nature of a partition between tenants in common. The Land Commission decided that if the King should allow the landlords one-third, to the tenants one-third, and retain one-third himself, "he would injure no one unless himself." Principles governing the Land Commission, Revised Laws Hawaii, 1905 p. 1167. The Kingt hereupon agreed to take certain lands, and to give the chiefs certain others, but not only were the chiefs obliged by statute to take their portion before the Land

Commissioners for awards, but the partition, as shown aboved contained an express reference to the necessity of this course, in the words "consent is given to take it before the Land Commissioners." On the other hand, the statute of 1839 respecting fisheries has been decided by this Court to be in the nature of a grant: Not only was there no statute requiring confirmation by the Land Commission, but the Land Commission itself was not created till seven years afterwards. The anology fails completely.

With reference to the inquiry at pages 21–2 of the opposing brief as to how the lines of the fishery are to be run, we submit that this is, at the most, a question of proof, under the authorities cited at p. 12 *et seq.* of our original brief. The offer to prove possession for sixty years of the fishery, under the grant, and as described in plaintiffs' complaint (Record, p. 17), was an offer to "give precision to" the subject-matter of the grant, if any were needed, plainly within the principle of those authorities, and should have been allowed.

The Court below and the opposing brief (p. 20) both refer to an act passed in 1851 (Session Laws, Hawaii, 1851, p. 25), providing, "No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the

minister of the interior." It does not appear that the Court attached any importance to this act as affecting the rights of the plaintiff in error in this case, and it is very clear that the act is not capable of such a construction; because, in the first place, the fishing grounds of the plaintiff in error and his predecessors in title were "included in his title," for the obvious reason that the decision of the Court in the case of Haalelea *v.* Montgomery, recognizing that title in the landlords, was rendered seven years after this act was passed, and, of course, with full knowledge of it, and for the further reason that the land owned by the plaintiffs in error in this case is not and never was Government land. The fact that persons who bought Government land have, under this statute, no fishing rights connected therewith, is universally recognized in Hawaii; but the rule has no possible application to the case at bar. Moreover, Sec. 2 of this same act of 1851, accompanying and directly following the section in question, quoted by the Court below, provides: "If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall only be tabooed when caught within the bounds of the konohiki's private fishery"—thus clearly recognizing a vested interest in the konohiki or landlord to such private fishery.

The proposition at page 22 of the opposing brief that the appellants fishing rights can be claimed only as appurtenant to the land granted, because not mentioned in the Land Commissioners' award and the royal patent

based upon it, is only the presentation in another form of the contention above already considered that the omission to present the piscary claim to the Commission is a bar, notwithstanding its decision that it had no jurisdiction of such a claim, and would not consider it if presented; and the proposition, therefore, need not be further discussed. The fishing rights of the predecessor in title of the plaintiff, equally with his rights to the land, existed prior to the creation of the Board of Land Commissioners, and could neither be destroyed or reduced to a mere appurtenance of the land by the refusal of that Board to receive or to exercise jurisdiction over his claim to those rights.

With regard to those portions of the opposing brief dealing with prescription and custom, the appellee seems to misapprehend the purpose for which the proof was offered.

The present plaintiffs in error need only show that A. Paki, their predecessor in title, was in the position of grantee under the grants contained in the statutes. Under the law of 1839, wherein the King "gives * * * another portion to the landlords" (defined as the fishing grounds from the coral reef to the sea beach), it would seem to be necessary only to show that Paki was the landlord, which is undisputed. Under the law of 1846, the fishing grounds "shall, in like manner, be considered private property of the landlord whose lands by ancient regulation belong to the same." Whether this "ancient regulation" was in the nature of appurtenance, prescription, or ancient custom is immaterial; its existence was recognized by statute, and the plaintiffs' offer

of proof to bring them within the statute was rejected by the trial court.

As indicative of the extent to which the opposing brief has gone in repudiating the decision of the questions settled by the Damon case, it concludes by gravely contending that "the statutes of Hawaii relative to fisheries did not and were not intended to operate as grants of any property rights, but were designed, and have always been regarded, as mere general regulations concerning the use of certain public property, to wit: the fisheries,"—and this notwithstanding the following explicit language of this Court in the Damon case: "The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and, if they imported a grant, or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. * * * If the Hawaii statutes did not import a grant, it is hard to see their meaning."

Every proposition and argument advanced in the opposing brief on this branch of the case was presented to the Court in the Damon case, and was there given full consideration. It is respectfully submitted that the decision in that case is controlling and conclusive, and that further consideration of the subject is unnecessary.

Respectfully submitted,

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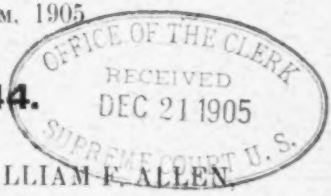
Supreme Court of the United States.

OCTOBER TERM, 1905.



No 144.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON And ALFRED W. CARTER, Trustees under the will of Bernice Pauahi Bishop, deceased,

PLAINTIFFS IN ERROR,

vs.

TERRITORY OF HAWAII,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

EMIL C. PETERS,
Attorney-General, Territory of Hawaii,

FRED W. MILVERTON,
Deputy Attorney-General, Territory of Hawaii,

FOR DEFFENDANT IN ERROR.

PRESS OF THE HAWAIIAN GAZETTE CO., LTD., HONOLULU

(19,573)

Supreme Court of the United States

OCTOBER TERM, 1905.

Number 144.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON and ALFRED W. CARTER, Trustees under the will of Bernice Pauahi Bishop, deceased,

Plaintiffs in Error,

vs.

TERRITORY OF HAWAII,

Defendant in Error.

In Error to the Supreme Court of the Territory of Hawaii:

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On May 1st, 1902, the plaintiffs in error commenced an action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, claiming to be the sole and exclusive owners in fee simple of a certain sea fishery situated within the

reef in Waialaeiki, Island of Oahu, Territory of Hawaii, bounded and described as follows:

"Beginning at a point on the sea shore at a yellow colored stone at the end of the Wailupe fish wall, said point being on the boundary of Waialaeiki and Wailupe, and running 35° 00′ E. magnetic to the outer line of breakers on the reef in Waialae Bay, thence running along said outer line of breakers to a point which is S. 60° E. magnetic from the boundary of Waialaeiki and Waialaenui; thence

"North 60° 00′ W. to said boundary at the seashore at high water line at the mouth of the Kapakahi Stream, and thence along the shore line of Waialaeiki at high water line to the initial point, the direct bearing and distance being N. 50° 00′ E., 6500 feet more or less."

Transcript of Record, p. 10.

The particular fishery claimed by the plaintiffs in error consisted of the right each year to set aside for themselves, for their sole and exclusive use within the fishing grounds within the metes and bounds above set out, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit upon consultation with the tenants of their lands all fishing upon the fishing grounds within the metes and bounds above

set forth during certain months of the year, and during the fishing season to exact from each fisherman one-third of all the fish taken upon said fishing ground.

Transcript of Record, p. 11.

This claim of right was alleged to be based upon two grounds:

First, that from time immemorial the plaintiffs in error and their grantors, by ancient custom and prescription, have had an exclusive fishery within the bounds above set out, subject only to the rights of tenants on the land of Waialaeiki.

Second, that said fishery was originally appurtenant to the land of Waialaeiki awarded to A. Paki by Apana 3 of Land Commission Award No. 10,613 and confirmed by Royal Patent No. 3578.

Transcript of Record, p. 11.

After the filing of an answer by the Territory of Hawaii denying generally all of the allegations of the complaint except those relating to the interest claimed by the Territory, a hearing was had, and subsequently, on July 17th, 1902, a bill of exceptions and agreed case was filed showing the following facts:

(1) That the plaintiffs in error had the legal title to the land at Waialaeiki to which it was contended the fishing right claimed by them was appurtenant.

(2) That on April 8th, 1857, Royal Patent No. 3578 was issued by King Kamehameha III. grant-

ing to one A. Paki, 1391 acres of land, more or less, situated at Waialaeiki, Ili of Waikiki, Island of Oahu, such land being described in the patent by metes and bounds, and being the same land to which the plaintiffs in error claimed the fishery in question to be appurtenant.

(3) That the fishery right claimed by the plaintiffs in error was not mentioned or referred to in any manner in said Royal Patent No. 3578.

(4) That Royal Patent No. 3578 was based upon a Land Commission Award made on the 19th day of March, 1853, by the Board of Commissioners to Quiet Land Titles, and that this award contained no reference to any fishery claim or right.

(5) That the plaintiffs in error claimed to have acquired a vested right in the fishery referred to in the complaint by virtue of the laws of the kingdom of Hawaii and by virtue of the common law of Hawaii and of ancient custom in Hawaii, and that plaintiffs in error offered to prove in support of this claim that for a period of sixty years they, and those under whom they claimed title, had been in possession of the sea fishery of Waiakaeiki described in the complaint, claiming title to the same; that said possession so far as the Konohiki or landlord's) right was concerned had been continuous, exclusive and notorious for said period and under a claim of right; and that the rights claimed to said fishery consisted of the

right each year to set apart for themselves, for their sole and exclusive use, within the fishing grounds according to the metes and bounds set out in the complaint, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart, and also the right in lieu of setting apart some particular fish for their exclusive use, to prohibit, upon consultation with the tenants of their lands, all fishing within the fishing grounds within the metes and bounds set forth during certain months of the year, and during the fishing season to exact from each fisherman one-third of all the fish taken from said fishing grounds.

(6) That the plaintiffs in error offered to prove that from time immemorial by Hawaiian custom and by the common law of Hawaii, prior to the passage of the Act of June 7th, 1839, relating to fisheries, a similar right to the sea fishery at Waialaeiki had been held and enjoyed by those under whom the plaintiffs in error claimed title, as appurtenant to the land of Waialaeiki.

(7) That the plaintiffs in error offered to prove that prior to the enactment of June 7th, 1839, relating to fisheries, that rights similar to those set out in said statute from time immemorial had been enjoyed by those under whom the plaintiffs in error claimed title to the land of Waialaeiki, as appurtenant to said land and that said rights

had been openly, continuously and notoriously asserted and exercised under claim of title, to the exclusion of all other persons.

(8) That the presiding judge at the hearing rejected all of the proffered testimony as above set out, and ruled that no vested rights could be acquired in sea fisheries in Hawaii by virtue of any occupation or custom of the country or any statute of Hawaii respecting fisheries, and that upon the repeal of the laws of Hawaii respecting fisheries by the Organic Act the fishery right claimed became terminated, and accordingly ordered judgment entered in favor of the Territory of Hawaii; to all of which rulings the plaintiffs in error duly excepted.

At the October 1902 term, the Supreme Court of the Territory of Hawaii heard the exceptions in this case in conjunction with exceptions in the case of Samuel M. Damon vs. The Territory of Hawaii. There is an important and substantial difference between the cases, however.

In the Damon case the claim for a fishery was based principally upon a clause in the Royal Patent which recited that there was attached to the land a fishing right in the adjoining sea, and the metes and bounds of this fishing right were set out in the patent itself.

Transcript of Record, p. 29.

This court, when the matter was before it in the Damon case at the October 1903 term, (194

U. S. 154), held that a definite "fishing right in the adjoining sea" described in the granting clause of a Royal Patent as "attached to the land" is included in the grant, although the habendum is to have and to hold "the above granted land," which, standing alone, might not include a fishing right.

In the case at bar as we, have shown, neither the Land Commission Award nor the Royal Patent contain any reference to a fishing right.

The exceptions in this case, as well as in the Damon case, were decided by the Supreme Court of Hawaii on November 15, 1902, and it was then held that the Hawaiian statutes giving konohikis (or land lords) special privileges in the sea fisheries adjoining their land, were not grants of property or covenants in the nature of grants but were public statutes in which no one could acquire a vested right; that the phrase "private property" used in the statutes denoted no more than the special rights or privileges given by law over the sea fishery; that when the statutes were repealed by the Organic Act of the Territory the konohiki or land lord no longer had any private property in such fishery; that exclusive rights in sea fisheries surrounding the Hawaiian Islands could not be acquired by prescription or ancient custom; and that the konohiki's or land lord's "private property" in the sea fishery could not pass as an appurtenance to the land.

Transcript of Record, pp. 19, 20.

The exceptions in this case were consequently disallowed by the Supreme Court of the Territory and the judgment of the Circuit Court confirmed, whereupon a writ of error was brought to this Court.

BRIEF OF THE ARGUMENT.

I.

SHORT HISTORY OF LAND TITLES IN THE HAWAIIAN ISLANDS.

Until the year 1839, a state of affairs very much resembling the feudal system of Europe during the middle ages existed in the Hawaiian Islands.

Previous to the conquest by Kamehameha the First of the whole islands, each island had a king or high chief, and the districts or sub-divisions within them were governed by a chief owing fealty to the high chief, and to whom the rest of the sub and petty chiefs of the particular island owed allegiance, and from whom such sub or petty chiefs received their lands.

When the islands were conquered by Kamehameha the First he followed the example of his predecessors and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants.

Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were sub-divided again and again, often passing through the hands of four, five or six persons from the king down to the lowest class of tenants. All these persons were considered to have rights in the

lands or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.

All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the king, not only a land tax which he assessed at pleasure, but also service which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions of the land in addition to the yearly taxes.

A failure to render any of these was always considered a just cause for which to forfeit the lands. The same rights which the king possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the king really owning the allodium, and the person in whose hands he placed the land holding it in trust, and at the will of the king.

In the year 1839 began that peaceful but complete revolution in the entire polity of the kingdom which was finally consummated by the adoption of the Constitution of 1852. King Kamehameha III began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first Constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that constitution he voluntarily divested himself of some of his

powers and attributes as an absolute ruler and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the king, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal chief or suzerain of the kingdom. He had not as yet yielded any of those rights. An illustration of the arbitrary power of the king at about this time is found in Chapter 3 of the Laws of 1839, promulgated by Kamehameha III, which is as follows:

"His Majesty the King hereby takes the fishing "grounds from those who now possess them, from "Hawaii to Kauai, and gives one portion to the "common people, another portion to the landlords, "and a portion he reserves to himself. These are "the fishing grounds which His Majesty the King, "takes and gives to the people. The fishing grounds "without the coral reef, namely: the Kilohee "grounds, the Lohee grounds, the Malolo grounds, "together with the ocean beyond. But the fishing "grounds from the coral reef to the seabeach are "for the landlords and for the tenants of their sev-"eral lands, but not for the others."

Whatever vested rights in property, including

fisheries, are claimed at the present time, must of necessity have had their foundation subsequent to the year 1839. Prior to that time the king was the absolute owner of all property within the kingdom, and no vested rights could be acquired by any of his subjects.

It being obvious that the internal resources of the country could not be developed while the system of undivided and undefined ownership in land continued, a law was enacted in 1846 providing for the establishment of a Board of Land Commissioners for the purpose of effecting a division of rights in land and of quieting titles throughout the kingdom.

Laws of Hawaii, 1846.

In order to obviate the difficulties standing in the way of a consummation of the purposes for which the commission was created, it was resolved by the king in council to effect, through the assistance of a committee, a division of lands between the king as suzerain and the high chiefs and konohikis (or overlords) as feudatories. This division was soon effected and on June 7th, 1848, a law was passed entitled "An Act Relating to the Lands of His Majesty the King and of the Government," which provided as follows:

"Whereas, it hath pleased his Most Gracious "Majesty, Kamehameha III, the King, after reserv "in certain lands to himself as his own private "property, to surrender and forever make over

"unto his chiefs and people the greater portion of "his royal domain;

"And Whereas, it hath pleased our Sovereign "Lord, The King, to place the land so made over "to his chiefs and people in the keeping of the "House of Nobles and Representatives or such per- "son or persons as they may from time to time "appoint to be disposed of in such manner as the "House of Nobles and Representatives may direct "and as may best promote the prosperty of this "kingdom and the dignity of the Hawaiian Crown;

"Therefore be it Enacted by the House of "Nobles and Representatives of the Hawaiian Is- "lands in Legislative Council assembled:

"That expressing our deepest thanks to His "Majesty for this noble and truly royal gift, we do "hereby solemnly confirm this great act of our "Good King and declare the following named "lands, namely:

"Name of Lands	Ahupuaa	Districts	Islands
"Puuwaawaa	Ahupuaa	Kona	Hawaii
"Haleohiu	"	"	"
"Puaa	"	"	"
" Etc.	Etc.	Etc.	Etc.

"to be the private lands of His Majesty, Kame- "hameha III, to have and to hold to himself, his "heirs and successors forever; and said lands shall "be regulated and disposed of according to his "Royal Will and pleasure, subject only to the "rights of tenants.

"That we do hereby in the names of the Chiefs "and people of the Hawaiian Islands, accept of "the following lands, viz:

"Names of Lands.	Ahupuaa	Districts	Islands
"Puuanahula	Ahupuaa	Kona	Hawaii
"Kukio I	"	"	"
"Kukio II	"	"	"
" Etc.	Etc.	Etc.	Etc."

Civil Code, 1859, p. 374.

This division of the lands of the kingdom, commonly known as the "Great Mahele," bears a great similarity to the division of the fisheries made in 1839. but it has been continually held, as we shall show, that the mahele passed no title to the lands enumerated in any person unless ratified by the Board of Land Commissioners.

A very interesting historical account of the origin of land titles in the Hawaiian Islands will be found in the cases of

In re Estate of Kamehameha IV, 2 Haw. 715,

Thurston vs. Bishop, 7 Haw. 421.

and in the "Principles Adopted by the Board of Land Commissioners to Quiet Title in Their Adjudication of Claims Presented to Them."

Laws of Hawaii, 1847.

Revised Laws of Hawaii, p. 1164.

II.

THE FISHERY RIGHT CLAIMED BY PLAINTIFFS IN ERROR (IF ANY EVER EXISTED) WAS LOST BECAUSE NOT PRESENTED TO THE LAND COMMISSIONERS FOR AWARD.

Section 8 of the act creating the Board of Land Commissioners (Laws of Hawaii, 1846) provides that:

"All claims to land, as against the Hawaiian "Government, which are not presented to said "Board within the time, at the place and in the "manner prescribed in the notice required to be "given in the fifth section of this article, shall be "deemed to be invalid, and shall be forever barred "in law, unless the claimant be absent from this "kingdom and have no representative therein."

Section 13 of the act provides that:

"The titles of all lands claimed of the Hawaiian "Government anterior to the passage of this act, "upon being confirmed as aforesaid, in whole or "in part, by the Board of Commissioners, shall be "deemed to be forever settled as awarded by said "Board, unless appeal be taken to the Supreme "Court, as already provided. And all claims re-"jected by said Board, unless appeal be taken as "aforesaid, shall be deemed to be forever barred "and foreclosed, from the expiration of the time al-"lowed for such appeal."

These provisions of the act creating the Board of Land Commissioners constitute a general statue of limitations, and it was so held in the case of

Thurston vs. Bishop, 7 Haw. 421, 423.

A. Paki, the predecessor in interest of the plaintiffs in error, made no claim before the Land Commission for any fishing right. The Land Commission award made on the 19th day of March, 1853, contains the following language:

"He made claim for his land of Waialaeiki, "being a Ili of Waikiki, Kona, on the Island of "Oahu, because he came into possession of this "land from Kamehameha III at the time of the "division of land in the A. D. 1848, and has peace-"ably held it to the present time without inter-"ruption. Thus we award to A. Paki that he has "title less than allodial. In case he should pay "the Government's share, then he is entitled to a "royal patent in fee simple."

Transcript of Record, p. 38.

Royal Patent No. 3578 to A. Paki based upon the award of the Commissioners describes by metes and bounds the land at Waialaeiki claimed by A. Paki, but contains no reference whatever either by metes and bounds or otherwise to any fishing rights or fishing grounds adjoining the land granted.

Transcript of Record, p. 33.

That the Board of Land Commissioners was given express authority to award fishing rights is clearly apparent from the statute which created the Board, Section 7 of which provides as follows:

"The decisions of said Board shall be in accord-
"ance with the principles established by the Civil
"Code of this kingdom in regard to prescription,
"occupancy, fixtures, native usages in regard to
"landed tenures, *water privileges and rights of*
"*piscary*, the rights of women, the rights of ab-
"sentees, tenancy and sub-tenancy—primogeni-
"ture and rights of adoption; which decisions
"being in majority of a number of said Board shall
"be only subject to appeal to the Supreme Court,
"as prescribed in the act to organize the judiciary,
"and when such appeal shall not have been taken,
"they shall be final."

It has been the law of the Hawaiian Islands since the time of the establishment of the Land Commission that any person who had a claim cognizable by the Board and failed to present the same and obtain an award thereon, lost his claim.

"The Land Commission was a court and had
"full jurisdiction to settle all claims to land,
"whether by claimants of the larger divisions of
"land as divided in ancient time by name or by
"the natives living on the land under the chiefs.

"If the Land Commission expired and the native
"tenants neglected to present their claims for the
"parcels of land which they desired, and for which

"they would ordinarily be awarded a kuleana "title, showing merely their occupation of the "same as a foundation for it, we think they must "be considered as content with their prior status "as tenants by permission of the landowner. Such "tenancy would, therefore, in law be considered as "continuing until some act of theirs changed their "holding from the permissive nature to one of "adverse or hostile nature."

Dowsett vs. Maukeala, 10 Haw. 169.

"No claim to the land called Opu had been pre-"sented to the Commissioners to quiet land titles "within the time limited by statute for filing such "claims and the land had not been awarded by "the Commission to any one nor had a royal patent "been issued to any one for it. Held, that by "the force and effect of the statute creating the "Land Commission, the claim which defendant's "predecessor had to this land was barred in law "by non-presentation to the Commission and they "had no title to it. The land not being held by the "defendant by some title proceeding from the gov-"ernment, it is still the property of the govern-"ment."

Thurston vs. Bishop, 7 Haw. 421.

"The construction put upon the statute that a "failure to present a claim within the prescribed "time absolutely barred the claimant by the legis-"lative power of the kingdom, the King and the "Nobles and the Representatives, and uniformly

"concurred in and acted upon by successive gov-"ernments under many reigns following, and to "this day undisturbed by any judicial decisions, "we are not at liberty to disregard."

Thurston vs. Bishop ,7 Haw. 432.

"The Mahele itself does not give a title. It is "a division and of great value, because if confirmed "by the Board of Land Commissioners, a complete "title is obtained, but it was open to examination "and if the evidence was satisfactory that the "konohoki was entitled to the land according to "the principles which governed the Board of Land "Commissioners, their award gave a complete "title. By the Mahele, his Majesty, the King, "consented that Pahoa should have the land sub-"ject to the award of the Land Commission. It "appears by the whole course of legislation that "an award of the Board of Land Commissioners "was necessary to perfect the title until by the "laws of 1860 the Minister of the Interior was "authorized to grant awards."

Kenoa vs. Meek, 6 Haw. 67.

See also,

Kaai vs. Mahuka, 5 Haw. 356.

Kahoomana vs. Minister, 3 Haw. 639.

The requirement that all claims to lands and fisheries within the Hawaiian Islands had first to be presented to and passed upon by the Board of Land Commissioners in order to vest title is simi-

lar to a requirement contained in the Act of Congress of March 3rd, 1851, establishing a special tribunal for determining all claims to lands in the state of California based upon grants derived from the Spanish or Mexican government. In construing this act the court held in Brigido Botiller, et al., vs. Dominga Dominguez (130 U. S. 238) that no title to land in California dependent upon Spanish or Mexican grants, could be of any validity, which had not been submitted to and confirmed by the Board provided for that purpose, or, if rejected by that Board, confirmed by the District or Supreme Court of the United States.

The Civil Code of 1859 contains the following provision:

"SECTION 393. No person who has bought or "may hereafter buy any government land or ob- "tain lease or other title from any party has, or "shall have any greater right than any other per- "son resident in this Kingdom over any fishing "ground not included in his title, although adja- "cent to said land."

This provision was enacted in 1851, the same year that A. Paki secured his patent to the land at Waialaeiki, and at a time when the only title recognized was that based upon a Land Commission award, and it was evidently the intention of the legislature that if a fishing right was not specifically referred to in the title or patent, it should have no validity. This view is consistent

with the policy of the government, which seems, since the year 1839, to have been to enlarge to the fullest extent the rights of the public to the sea fisheries of the kingdom.

The claim of the plaintiffs in error to a statutory grant is based upon the indefinite language used by Kamehameha III in the Constitution of 1839 set out above, and upon subsequent re-enactments of those provisions.

The division of the fisheries by such general language like the division of the lands subsequently by the "Great Mahele" did not confer title, but only paved the way to secure title.

Kenoa vs. Meek, 6 Haw. 67.

Aside, too, from the fact that the predecessor in interest of the plaintiffs in error failed to perfect his title to the fishery (if any ever existed) before the Board of Land Commissioners, we can not see how the statutory enactments relating to fisheries can be construed as a grant or as creating any contractual relation. No specific description or bounds are given, no grantee is named nor is the nature of the estate claimed to have been granted specified. There is nothing to indicate any boundary between adjoining fisheries. A common shape of an Ahupuaa is that of a wedge sometimes with the apex at the beach, but more often the opposite. In any such case, in what direction would the seaward lines demarking the fisheries run? Would they run at right angles to

the beach or would they be extended to the reef upon the same course that the boundaries follow on the land? In the case at bar, how can the court say that under the general terms of the constitution of 1839 and subsequent re-enactments, the boundary of the alleged fishery claimed by the plaintiffs in error runs in a direction on the one side of South 35° East and on the other of North 60° West as alleged in the complaint? No such general language as the Constitution and statutes contain, no such uncertainty as to grantees, the subject matter of the grant and the nature of the estate, can be considered as intended for a grant in praesenti, an executed contract conferring a vested right.

One of the main objects for which the Board of Land Commissioners was created was to ascertain boundaries and quiet titles, which theretofore were vague and uncertain because of such defects as existed by reason of the loose and general language contained in the attempted divisions of the lands and fisheries made by Kamehameha III.

III.

THE FISHERY CLAIMED CAN NOT BE HELD TO BE APPURTENANT TO THE LAND GRANTED TO THE PREDECESSOR IN INTEREST OF THE PLAINTIFFS IN ERROR.

Neither the Land Commission Award nor the Royal Patent to A. Paki make mention of any fish-

ing right; so the plaintiff in error is forced into the position of claiming such a right as appurtenant to the land of Waialaeiki. It may be taken for granted that the court will agree with the statement that the right to fish in the tidewaters is a public right, and that under the English and American decisions and the common law of England, property in the sea belongs to no man, and that to give a person or persons monopolistic rights to control waters of the ocean, whether for fishing or other purposes, is against the teachings of American and English jurisprudence.

"The right to fish in the tide waters is a public "right."

13 Am. and Eng. Enc. of Law, p. 560, et seq.)

"By the common law, both the title and domin-"ion of the sea and of rivers and arms of the sea, "where the tide ebbs and flows, and of all the land "below high water mark, within the jurisdiction "of the Crown of England are in the King. Such "waters and the land which they cover, either at "all times or at least when the tide is in, are in-"capable of ordinary and private occupation, "cultivation and improvement, and their natural "and primal uses are public in their nature for "highways of navigation and commerce, domestic "and foreign, and for the purpose of fishing by all "the King's subjects. * * * * The common "law of England upon this subject at the time of

"the immigration of our ancestors is the law of "this country, except so far as it has been modi- "fied by the charters, constitutions, statutes or "usages of the several colonies and states or by the "constitution and laws of the United States."

Shively vs. Bowlby, 152 U. S., 1.

"Whatever soil below low water mark is the "subject of exclusive propriety and ownership, be- "longs to the state whose maritime border and "within whose territory it lies, subject to any law- "ful grants of that soil by the state or the sover- "eign power which governed its territory before "the Declaration of Independence, and this soil "is held by the state not only subject to, but, in "some sense, in trust for the enjoyment of certain "public rights, among which is the common lib- "erty of taking fish, as well shellfish as floating "fish."

Smith vs. Maryland, 18 How. 71.

"The right to navigate the public waters of the "state and to fish therein, and the right to use the "public highways are all public rights belonging "to the people at large. They are not private, "inalienable rights of each individual."

Lansing vs. Smith, 4 Wend. 9.

See also

Wooley vs. Campbell, 37 N. J. Law, 163.

Weston vs. Sampson, 8 Cush. 347.

"If the defendant has any title to the land under "the waters of that portion of Lake Huron known "as Thunder Bay, he must have derived it either "by grant from the United States or from the State "of Michigan. He claims it by grant from the "United States and by virtue of his riparian pro- "prietorship in Sulphur Island, and that as a con- "comitant of this interest in the soil he has the "exclusive right of fishery in the waters of the bay "in front of the island, at least so far as the driv- "ing of stakes in the soil and the use of trap nets "is concerned. What, then, are the boundaries "made by the United States Government of the "land on Sulphur Island? I have no hesitation in "saying that they are limited by low water mark. "* * * * There is nothing in the previous de- "cisions of this state which determines the defend- "ant's exclusive right of fishing at the points "stated in the declaration. I think that the "waters of Thunder Bay are public waters and the "right of fishing therein is a common right of all "citizens of this state, subject to the paramount "right of navigation, and is the subject of legisla- "tive control."

Lincoln vs. Davis, 53 Mich. 375.

The clear result of the foregoing citations is that at common law the right to fish in tide waters is a public right; that the riparian proprietors have no greater right to fish in the waters adjoining their land than that possessed by every citizen, and that

there can be no exclusive right in such waters as an appurtenance to the lands bordering thereon. This doctrine is so well settled that there is nothing strange or straiting in the fact that it was adopted and carried out in the old Hawaiian decisions which have never been reversed.

In the case of Haalelea vs. Montgomery, 2 Haw. 70, the leading decision on ancient fishing rights, when special privileges were held by the landlords under the Hawaiian statutes, the Court held that the landlord's fishing rights were not an appurtenance to his ownership of the land, and could not be transferred by the landlord with his land as an appurtenance. The court says on page 70 of the decision:

"None of the rights of piscary possessed by M. "Kekanonohi as owner of the fishery could have "passed as a mere appurtenance to the piece of "land conveyed to Isaac Montgomery. She could "have transferred the fishery or her right therein "only by an express grant *co nomine*. Had she "made a deed even of the whole Ahupuaa by metes "and bounds not including the fishery nor express-"ly naming it in the conveyance, it is doubtful if "either the fishery or her rights therein would "have passed to the grantee."

The doctrines laid down in Haalelea vs. Montgomery should not now be shaken. They have stood as the undisputed law of the Hawaiian Islands since 1858. There is nothing

inconsistent in those doctrines with either natural law, the common law of England or the laws of the United States. That case established a rule of property upon which the people of these islands have relied for nearly half a century and that rule should not at this late day be disturbed.

IV.

A FISHING RIGHT CAN NOT BE ACQUIRED BY PRESCRIPTION.

A further contention of the plaintiffs in error is that they have acquired the fishing right in question by prescription; but to hold that prescriptive rights to fish may be acquired in tide waters would be to ignore the principle that exclusive fishing rights can be acquired only from the legislature, and to upset the rule that time does not run against the state.

"There is no prescription against the state. "6 Peters, 666. The Supreme Court of the United "States say in this case: " 'It is a well-settled "principle that the Statute of Limitations does not "run against the state. If a contrary rule were "sanctioned, it would only be necessary for in- "truders upon the public lands to maintain their "possession until the Statute of Limitations shall "run; and then they have become invested with "title against the government and all persons "claiming under it. In this way the public do- "main would soon be appropriated by adventur-

"ers. Indeed, it would be utterly impracticable "by the use of any power within the reach of the "government, to prevent this result. It is only "necessary, therefore, to state the case in order to "show the wisdom and propriety of the rule that "the statute never operates against the govern-ment."

Thurston vs. Bishop, 7 Haw. 437.

"The theory of titles by prescription is, that the "holding possession of an estate openly and ad-"versely for a certain length of time creates an "inference that there was a grant from the ad-"verse claimant or his ancestors or grantors, and "the Statute of Limitations forbids the adverse "claimant from setting up against this long-con-"tinued possession, the fact that there was no "grant. But as against the government, a grant "can not be presumed or inferred from long pos-"session in view of the law which required claim-"ants to land to present their claims to the Land "Commission for confirmation or rejection."

Kahoomana vs. Minister, 3 Haw. 640.

Prescription pre-supposes a grant vesting an interest. As we have shown, no person could acquire a vested interest in property prior to 1839, and any grant subsequent to that time would have to be confirmed by the Land Commissioners in order to make it valid. As stated in Fishing Company vs. Carter, 61 Penn. St., 21:

"Independently of the acts of Assembly, there "is no exclusive right of fishing by the riparian "proprietor opposite to his shore in any navigable "river. * * * * In England there are such "several and exclusive fisheries in navigable rivers "attached to manors, either by early grant from "the crown or by prescription, because there "might have been such a grant upon which to "found it. In this state there can be no such pre- "scription. Prescription rests upon a presump- "tion of a grant which has been lost by process of "time. No prescription, therefore, can have a "legal origin where no grant could have been made "to support it."

Whatever dicta there may be in other jurisdictions relative to the acquisition of fishing rights by prescription, we submit that such method of acquiring title in these islands has never been recognized. In the "Principles Adopted by the Board of Land Commissioners (Laws of Hawaii, 1847), will be found the following:

"* * * * The King representing the Gov- "ernment, having formerly been the sole owner of "all the soil, he must be considered to be so still "(August 20th, 1846) unless proof be rendered to "the contrary; and even *possession of ever so long "standing* can not be proof of anything more than "that which is specified above as belonging to the

"landlord or to the landlord and tenant, as the "case may be."

These principles of the Land Commission have been expressly recognized as part of the law of the land.

Kahoomana vs. Minister, 3 Haw. 639.

There is absolutely no merit in the prescriptive claim.

V.

A FISHING RIGHT CAN NOT BE ACQUIRED BY CUSTOM.

All that has been urged relative to the claim of title by prescription applies to the claim set up by the plaintiffs in error of "title by custom."

No custom antedating the act of 1839 could have any force or value. At that time the title to all the fisheries was in the King. The only law and the only lawful custom was the will of the King. The King's title passed to the government and became the subject of the legislative will as expressed in public enactments. The futility of inquiring into the ancient custom since the passage of the statute was recognized by the court in Hawaii.

Haalelea vs. Montgomery, 2 Haw. 70.

It can not be disputed that in 1839 the title to all the fisheries, as well as the land, was vested in

the King. It is true that the Land Commission recognized certain rights in the Chiefs and the People, but those rights were moral rather than legal and they only became legal rights upon the issuance of an award.

And as has been seen any claims that were not awarded lapsed and the title remained in the government or the awardee of a larger land within which the claim might have been asserted as the case might be.

It is probable that the King had previously allotted fisheries to his chiefs as it was his custom to do in regard to the lands, but such allottments merely created tenancies at the will of the King.

The Declaration of the King in 1839 that he resumed possession of the fisheries for the purpose of redistributing them goes to prove his absolute ownership and control of them, and indicates also that the act was not merely declaratory of pre-existing custom, but that it changed the allottment which had been in vogue theretofore.

"His Majesty, the King, hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords and a portion he reserves to himself," and further:

"These are the fishing grounds which His Majesty, the King, takes and gives to the people."

This language is not such language as would be

declaratory of pre-existing rights and custom. It is the language of an absolute power. He "takes" from one party who has held it heretofore and "gives" to another party according to his will. It is a distinct change in the allotment which had been in vogue theretofore.

VI.

THE STATUTES RELATING TO FISHERIES DID NOT CREATE VESTED RIGHTS.

Notwithstanding what the court said in the case of Damon vs. Territory of Hawaii, 196 U. S. 154, we respectfully but earnestly contend that the Statutes of Hawaii relative to fisheries did not and were not intended to operate as grants of any property rights, but were designed and have always been regarded as mere general regulations concerning the use of certain public property, to-wit: the fisheries.

It is admitted that the "Konohiki's" or landlord's right of fishery was a property right as long as the Statute remained in force, but it is denied that it was a vested right in the sense that it could not be changed or defeated by act of the legislative authority, either by way of an amendment, making a new distribution of the fisheries, or by a repeal putting an end to all exclusive rights, and in this sense we use the word "property" and believe it is used in the various Statutes in the general sense,

meaning dominion over a thing, and that the words "private property" in these Statutes cannot mean more than the rights which the Statute gave to the Konohikis or landlords over the fishery, and such private property could not be said to be held by contract or by any covenant in the nature of a contract.

A mere expectation based upon an anticipated continuance of general laws cannot be claimed to be a vested right. In order to be a vested right there must be an actual title to some property.

Not only is the right of fisheries in tide waters a public right, but "laws for the regulation of fishing are public Statutes of which the Court takes judicial notice."

Gould on Waters, Sec. 189.

That the Statute in question prescribes the "piscatory regulations" of Hawaii.

See Haalelea vs. Montgomery, 2 Haw., 65.

It is well settled that there can be no vested right under a public statute relating to a public subject that does not amount to a grant or contract.

"The Dartmouth College case was the pioneer in this field of our jurisprudence. The principle there laid down, since maintained in the cases which have followed and been controlled by it, has no application where the Statute in question is a public law relating to a public subject within the

domain of the general legislative power of the State and involving the public, rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation."

Newon vs. Commissioners, 100 U. S., 587.

"It is generally agreed, however, that there can be no such thing as a vested right in a public law, which is not in the nature of a grant, hence, however beneficial an act of the legislature may happen to be to a particular person, or however injurious its repeal may affect him, the legislature would clearly have the right to abrogate it. Indeed, the legislature has the undoubted right to repeal all legislative acts which are not in the nature of contracts or private grants.

Dobbins vs. Bank, 112 Ill., 562.

In Maryland a Statute authorized any citizen of any county bordering on the waters of the State to locate and appropriate within the waters therof any area not exceeding one acre, for the purpose of depositing and bedding oysters. Under this act it was held that "It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred that no transfer of the States's title to lands covered by navigable water was contemplated. Permission to use

given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the State but as a conditional license, revocable at the pleasure of the legislature."

Phipps vs. State, 85 Am. Dec., 654.

In Pratt vs. Brown, 3 Wis., 603, it was held that the right given by statute to mill owners to build dams and flood their neighbors' lands was not a vested right, but one which terminated with the repeal of the act. We submit that that case is directly in point here. The case has been attempted to be distinguished on the ground that the mill dam act under which the dam was built was void because of its taking private property for private purposes. The point is not well taken. The decision in that case shows that the constitutionality of the act had been previously sustained. The flooding of lands for mill purposes is generally considered a public purpose. See Commissioners vs. Water Power Co., 104 Mass., 446.

"A privilege to a private person to use a public right for his private gain will not be deemed exclusive unless the intent of the legislature is perfectly clear. All these great rights are held in trust for the general good, and the representatives

of the people must be deemed not guilty of a breach of this trust, or a dereliction of duty. Hence nothing less than a plain contract between the State and the individual for an adequate consideration can bind the hands of the State and prevent the repeal of a mere privilege."

Johnson vs. Crow, 87 Pa. St., 189.

Regarding the declaration of the King of 1839 as a "mahele," the mere declaration or division cannot be construed as conferring any title.

The Great Mahele of the lands did not confer title but only paved the way to get title.

Kenoa vs. Meek, 6 Haw., 63.

By parity of reasoning the King's declaration as to the fisheries, less formal and definite than the mahele of the lands as it was, did not give any title, but at best, merely paved the way to get title through the Board of Land Commissioners.

The fact that the konohikis owned no lands in 1839 tends to prove that the statutory declaration and enactment was not intended to be a grant in praesenti. And the further fact that but few fisheries were awarded by the Land Commission goes to show that but few persons were able to prove their claims according to the rules and principles which governed the Commission.

We find that a somewhat similar principle is

recognized in the United States land system. Thus it has been held that the swamp land act of 1850 "made a grant in praesenti, in other words, the title then passed to all lands which at that date were swamp lands; and the only matters thereafter to be considered were those of identification. But while the act operated as a grant in praesenti, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. * * * * It will be perceived that the act contemplated the issue of a patent as a means of transferring the legal title. * * * * When he (the Secretary of the Interior) made such identification, then, and not before, the State was entitled to a patent, and on such patent the fee simple title vested in the State. The State's title was at the outset an inchoate one and did not become perfect, as the date of the act, until a patent was issued."

Lumber Co. vs. Rust, 168 U. S., 589.

Under such a statute the failure of the Secretary of the Interior to identify any land or particular tract of land as swamp would be the equivalent of the failure or refusal of the Land Commission to award a fishery. The title would not pass to the claimant. He would acquire no vested right.

While it is conceded that private exclusive rights in the public waters may be obtained by

individuals, it is earnestly contended that they can only be obtained by clear and unequivocal grant under legislative authority. And while the necessity and duty of the courts to protect vested rights is freely admitted, it is submitted that the burden is on the party claiming such a right to prove that he has it.

It seems very clear that the general konohiki right was only a statutory privilege which was terminated by the Act of Congress which opened the sea fisheries to the public and saved only vested rights. The saving clause will not be rendered valueless by so holding, because some fisheries were actually awarded by the Land Commission, and the owners of such fisheries are protected in their property by that saving clause.

This Court in the case of Damon vs. Territory of Hawaii, 194 U. S., 154, did not go into the question of prescription or custom because the fishing right there claimed became "vested" upon the issuance of the Royal Patent, the patent itself specifically granting a fishing right and particularly defining its boundaries. The Court assumed in that case (page 161) that a mere grant of the ahupuaa (or tract of land) without mention of the fishery would *not* convey the fishery. That is our contention in the case at bar, and Section 95 of the Organic Act of the Territory, which in the

first section repeals all laws conferring exclusive fishing rights, and in the second portion declares that all fisheries in the sea-waters of the Territory, etc., are to be free to all citizens of the United States subject to vested rights, construed in the light of this contention will be found to be consistent within itself. The two portions of Section 95 are distinct and indicate that rights claimed under old statutes which had not been confirmed by the Land Commission award were not considered by Congress to be vested rights. Any other construction would render the section meaningless, because it would leave nothing upon which it could operate.

It is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

EMIL C. PETERS,
Attorney General, Territory of Hawaii.

FRED. W. MILVERTON,
Deputy Attorney General, Territory of Hawaii,
For Defendant-in-Error.

Supreme Court of the United States.

No. 144.—October Term, 1905.

Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, Trustees under the will of Bernice Pauahi Bishop, deceased, Plaintiffs in Error,
vs.
The Territory of Hawaii.

In Error to the Supreme Court of the Territory of Hawaii.

[January 8, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding to establish the plaintiffs' rights to a several fishery of the kind described in *Damon* v. *Hawaii*, 194 U. S. 154, and comes here under the same circumstances as that case did. The fishery in question is a sea fishery within the reef in Waialae Iki, island of Oahu, and is claimed by metes and bounds in the complaint. The plaintiffs are owners of the adjacent land under a royal patent following upon an award of the Land Commission, and the only difference between this case and the former one is that in this the fishery is not described in the royal patent, and that, apart from the question of prescription, upon which we shall say nothing, the plaintiffs have to rely upon the statutes alone. They offered evidence at the trial that before the action of the king in 1839, those under whom the plaintiffs claim title had enjoyed from time immemorial rights similar to those set out in the statutes, and also that they had been in continuous, exclusive and notorious possession of the konohiki right for sixty years. They offered in short to prove that their predecessor in title was within the statutes and therefore owned the fishery, it not being disputed that if he did, the plaintiffs own it now. The judge rejected the evidence and entered judgment for the defendant, and on exceptions this judgment and that in *Damon* v. *Hawaii* were sustained at the same time in one opinion by the Supreme Court. 14 Haw. 465.

We deem it unnecessary to repeat the ground of our intimation in the former case, that the statutes there referred to created vested rights. We simply repeat that in our opinion such was their effect. The fact that they neither identified the specific grantees nor established the boundaries, is immaterial when their purport as a grant or confirmation is decided. It is enough that they afforded the means of identification, and that presumably the boundaries can be fixed by reference to existing facts, or the

application of principles which have been laid down in cases of more or less similar kind.

The omission of the plaintiffs' predecessor in title to establish his right to the fishery before the Land Commission does not prejudice their case. See *Kenoa* v. *Meek*, 6 Haw. 63. That commission was established to determine the title to lands as against the Hawaiian Government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. See *Arkeni* v. *Wong Ka Mau*, 5 Haw. 91.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.